SIXTEENTH JOINT CONFERENCE

CONFEDERATION CENTRE
CHARLOTTETOWN, P.E.I.
WEDNESDAY, NOVEMBER 3, 1982

THEME
ARBITRATION

SPONSORS
P.E.I. LABOUR MANAGEMENT RELATIONS COUNCIL
&
LABOUR CANADA

INVOCATION

REVEREND LEWIS HOW

Let us begin our day together by asking God's blessing on our conference. Let us pray.

"Almighty God, you have linked our lives one with another that all we do affects for good or ill all other people. We ask you now here at this conference and in our day to day relationships so to guide us in the work we do that we may do it not for self alone but for the commongood and as we all seek a proper return for our own labour, make us mindful of the rightful aspirations of others and arouse our concern for those who are out of work. Help us regard listening to others as equally important to being heard and understood ourselves. Impress upon our hearts the remembrance that what we do among women and men, we do to you. Assist us to be evermore thankful for our many good gifts and to seek justice for all with diligence and enthusiasm. This we pray through Jesus the Christ our Lord and Redeemer. Amen."

GORDON LANK, MINISTER OF CULTURAL AND COMMUNITY AFFAIRS

Mr. Chairman, Mr. Mayor, and other special guests, Ladies and Gentlemen, due to a hurried trip to the hospital and the removal of his appendix, my colleague, the Honourable George McMahon, Minister of Labour, cannot be with you today. However, on his behalf and on behalf of the Government of Prince Edward Island, and more especially on my own behalf as acting Minister of Labour; it is both an honour and a pleasure to welcome you all here today from various parts of the Island. Also, a special welcome to out-of-province visitors and participants. We are very pleased to have you with us on this the sixteenth joint conference. Although I have had the pleasure of meeting unofficially with the Council Chairman and other members of the Council, I would say at this time, I wish to express my thanks publically to Professor Galloway and the members for their dedication, continued efforts in improvement of Labour Management relations in this province.

On George's behalf, I am sure I would be remiss in my duties if I did not especially thank Labour Canada for its continued support in our efforts in this very vital area of our economy. Especially I wish officials of the Labour Canada to convey to Mr. Caccia, Minister of Labour, how we appreciate his financial support in putting on this conference. I note, with interest, the theme for today's conference is Arbitration, Preparation and Presentation. It is being presented by Mr. John Sanderson, Q.C.

John's background in arbitration having participated in more than 1500 boards suggests that you, the Council, have done your homework while today you are all very privileged to hear first hand from such a highly regarded and active practitioner in labour relations. It is a very complex legal area of labour relations and so different from the give and take in the unlegal areas. It is an area, I am sure, we can all learn a little more about and today should be most interesting and beneficial to all participants. I might say that from speaking with John last night, I think you are going to have a really interesting day. You may even be shocked by times; I think you are going to hear some new things and some new ideas. I hope you will listen to him with an open mind. I told him how kind Islanders were when I called upon them from day to day during the election campaign; so I hope you will be kind to him today and give him a good hearing. Perhaps we need to be shocked and look at things differently sometimes.

Since you last conference, Mr. Chairman, I understand the Council has sponsored a training session for arbitration with nine interested persons taking the training. I join with you in the hope that as they continue to gain experience we will in Prince Edward Island be well equipped with a supply of well-trained experienced arbitrators to handle our own case load. While the specific topic of today's conference takes us beyond the work of labour-management committees, I cannot reiterate too strongly the need and the urgency particularly in today's economic climate for management and labour to have the means of maintaining continual dialogue in all matters pertinent to the survival and maintenance of good labour relations--the work place. This forum is normally through the labour-management committees and I would urge all companies not having formal committees to contact Mr. Jim Coles of the Department of Labour to assist in this very important area. We have on the island fifty-five active committees. This is a major improvement over ten years ago when we had about six or seven committees, but even today we cannot be complacent. Let us all sincerely work hard to make these committees effective, to reach our goals you set for yourselves, and to make your workplace more productive in good labour relations atmosphere.

Thank you Mr. Chairman, for this opportunity to welcome the participants in today's conference.

CHAIRMAN, IAIN GALLOWAY

Thank you Mr. Minister. Without Labour Canada as Gordon said, we would have a hard time putting on this conference. Labour Canada has been a faithful supporter of our conferences and has had a financial input of course which is very important. Representing Labour Canada today, we have no stranger to us, Ross Gardiner. Ross, would you say a few words on behalf of Labour Canada.

ROSS GARDINER, LABOUR CANADA

Thank you Iain. Mr. Minister, distinguished head table guests, Ladies and Gentlemen. Firstly, I would like to express my pleasure and gratitude in being with you and I thank you very kindly for inviting me. I think Iain's words were very kind and I am sure we are very interested in this conference in the P.E.I. Labour-Management Council and although our involvement at this point in time is not as active as it was a few years ago, that doesn't mean that our interest has lessened. It is my pleasant duty to bring you greetings from the Federal Minister of Labour, the Honourable Charles Caccia. He, unfortunately, is not able to be here, but he does wish you a very successful conference. Our Regional Director, Gerry Blanchard, unfortunately is detained in the Moncton office with regional duties. He asked me to wish you a successful conference and sends his best regards to one and all.

On a personal note, I hope that you do have a successful conference; certainly, the subject matter appears to me to be waiting and from there I think it is up to you to deal with that particular subject matter. There is a gentleman sitting in the audience who I would like to introduce, the District Manager of Labour Canada from New Brunswick, P.E.I., Lionel Leger. So, having said that, I thank you very kindly for being so attentive.

IAIN GALLOWAY, CHAIRMAN

I would like to welcome you to this conference on behalf of the Council. A particular welcome to the Confederation Centre. It is the first time we have had the conference here and we would be curious to have your impressions at the end of the day as to what the new format looks like to you. Of course, there is a questionnaire as usual and we would like you to take time to fill it out and also particularly to make a comment on the facilities because it is an experiment that we are running this year. If it is successful, of course, we would obviously like to continue.

Time is very important today because John's presentation in fact is normally done over, I think, at least two days--a two day conference type of thing; so you are going to hear an awful lot in one day and I don't propose holding him up very much with a speech this morning--normally a lengthy report from the Chairman. One of two things were touched upon by the Minister and I think I'll leave it at that and get right on to the subject of arbitration which is so important to all of us. After all, arbitration really is the ultimate protection against injustice if it works right, and in order to make it work right, we have to know some of the ground rules.

It is very easy to start an argument but it is very hard to predict where that argument is going to lead you and that is where John is going to take us today--from simple grievance all the way up to the end of the road which not so many of us have had the experience of. We couldn't be in better hands, I don't think, today. As the Minister suggests, John has had a very successful career. Let me correct that, it sounds as though he is finished! He is having a very successful career; it is still ongoing and his vast experience makes him just the kind of person we really want to talk to. Here in P.E.I. where we have arbitration on a fairly irregular basis, we are a small province and our experience therefore is limited to our size. I am sure John can draw from his very much larger experience to illustrate the points he is going to make today.

JOHN SANDERSON, GUEST SPEAKER

Thank you very much Mr. Chairman. Good morning Ladies and Gentlemen. I appreciate Iain's last words; I hope I am not finished in my career although two weeks ago I was running a marathon in New York City and about half way through I'm not at all sure I wasn't just about finished but I am still going.

We are going to be spending the day talking about a subject that is a bit ponderous and it is my purpose and my intention to do what I can to demystify it for you. I understand that two years ago my good friend, John Kervin, was down here and some of you may recall John. He spoke to you on the collective bargaining scene. My subject, of course, is to deal with the other side, that is the grievance and the arbitration side. Perhaps the useful starting point is to give you some understanding of why this subject is important, not only here in P.E.I., but elsewhere across the country.

Talking to some of your people last night, I discovered that there are in P.E.I. perhaps twelve to fifteen arbitrations a year. My perspective and my point to you is that, that number is going to increase dramatically and my guess is that you will find, as time goes on, in the next short while that the grievance and arbitration process will be increasingly used. Now that is not an idle observation. To put it into perspective for you, using some figures in Ontario, the percentage of arbitrations has grown about twenty-five percent per year in the last five years. In the private sector alone, there will be something like 2,800 arbitration hearings in this year, 1982, going to the grievance stage and I will be reviewing that matter in some detail with you shortly.

Using one single example-- International Nickel when it is in full operation in Sudbury has approximately 12,500 in the bargaining unit. In the last five years they have averaged in excess of 5,000 grievances a year. At the Stelco Works in Hamilton for approximately 10,000 employees, 3,000 grievances a year.

I don't give these as examples of good or bad labour relations, but merely to put some facts and figures before you. If I can briefly capsulize for you, it seems to me that in a time of some difficulty, in terms of economics, it is reasonable to assume that many of the problems that cause labour relations practitioners such as yourselves difficulty have to be worked out in some way. The anger, the frustrations, the disputes have to be resolved through a mechanism, and the mechanism that is normally used is the grievance and arbitration process. If you accept that generalization, it follows that as times become more difficult, and I think they will, then the grievance and arbitration process will be used increasingly. Now with that oversimplified and perhaps overgeneralized observation, let me try and sketch for you what this subject is all about.

Before I begin, let me tell you the program I intend to follow. I am going to begin with describing the arbitration and grievance procedure generally; then I am going to try and take you through the grievance procedure in a practical pragmatic way. I will try and give you as much guidance as I can on the sins of omission and commission in trying to avoid arbitration. Because that is what the theme of this conference is all about. Secondly, we are going to make the assumption that the grievance that you have been dealing with can't be resolved; it is going to arbitration. I am going to talk to you a little bit about the preparation of an arbitration case. What should you do and how to do it before you get in front of an arbitrator. Then finally, I am going to be discussing with you the arbitration process. Now let me quickly add, this will not be a legal lecture because I don't think you want to hear it and because I will probably fall asleep if I try and give it to you. In fact, there is too much legalism in the process; there are too many people that think this process is a difficult, tortuous legal thicket and therefore as much as I can I am going to try and demystify it for you.

Later this afternoon we are going to provide a question period, so if you have comments or questions during the day, I am going to ask you to bear with me and hold them off till the end. I will try and deal with your questions at that time. As Iain mentioned, we do have a fair amount of ground to cover. Interspersed with my rather pontifical remarks you will be relieved to hear that you are going to have the opportunity of viewing a couple of video tape presentations. The first you will be seeing after coffee this morning which deals with an actual incident in the plant and then a mocking grievance meeting. The second you will be seeing this afternoon deals with at least part of a arbitration hearing and I will be discussing those subjects in more detail later.

By the way, a couple of you spoke to me and said that I was misleading you before I had even spoke, and when I asked about that, I was told that your picture shows you without a beard. Let me explain that this is a time of restraint, both here and at my own home, and my twenty-one year old son has expropriated my razor and here I stand. Whether it is an improvement or not, I will leave it to you to judge; I get different views on that matter. Let me tell you what this is not, and that is a lecture on interest arbitration.

At Summerside, I understand, there is an arbitration hearing going on now to deal with the contract dispute between the town and local force. The police are seeking increases in salary; there is a contract dispute and an arbitrator is resolving that dispute and settling the contracts between the parties. That is known as an interest arbitration, and we are not going to be talking about that subject. We are going to be talking about the subject of rights arbitrations. Those briefly stated are disputes arising out of the application administration or interpretation of a collective bargaining agreement.

Those of you who may have any historical background may recall a phrase, "the courts of equity," and back in the Thirteenth Century in England a legal process developed that we now know as arbitration. That was a process whereby outside of the formal courts, disputes and difficulties between private parties would be resolved on a consensual basis; that is, by the selection of those parties by a third or neutral party who would issue a decision that in turn was binding upon the two parties to the matter. So the arbitration theory has a long and honourable history. In the early days of the then Canada Labour Code, the then Deputy Minister of Labour who ultimately became Prime Minister of Canada, MacKenzie King, drafted in that act a provision that is now in your statute--section 36 and indeed is found in the statute law of every other province in this country. Specifically a requirement, an obligation that under every collective agreement, there must be a provision whereby the disputes between the parties to the agreement will be resolved by final and binding arbitration. And that Ladies and Gentlemen is the starting point.

You must understand in order for this whole subject to make sense to you that MacKenzie King and the subsequent drafters of the legislation made a conscious, deliberate legislative tradeoff. The first half of the equation was a prohibition against strikes or lockouts during the lifetime of an agreement. "Thou shalt not strike," that's what the law said. The second half was a recognition and awareness that during the lifetime of any collective agreement, there necessarily would be some dispute or argument or debate concerning the application for the administration of that same agreement. Therefore, there had to be a mechanism to resolve those disputes. In the current buzz words, the bottom line is that unless the grievance and arbitration process works effectively to resolve those disputes, then that equation breaks down and the prohibition against strikes will be breached and because these tensions and difficulties must be worked out in some way, but that is a subject I will return to later. In any event, let me say again, the tradeoff is you can't strike but you as a bargaining group, you the union, and you the employees, do have recourse if you feel the employer has breached the agreement. Now stated that way, that is a bit misleading too, because it is equally important to understand that the grievance and arbitration process is a two-way street and employers may, in the proper circumstances, do file grievances against trade unions where the trade union is in breach of the agreement. The most common example would be if a wildcat strike takes place. Since the union has contracted, as it must, that there will be no strike, it follows that the employer may file a grievance claiming the union has violated the agreement, and in a proper case the arbitrator may award damages or compensation arising out of that breach. That issue was decided by my Lord Chief Justice Laskin when he was a professor of law back in 1954, in the well-known Polymar case. My point to you is not to discuss that subject but simply to make the point that we are talking about disputes between the parties and the parties include the union, the employer and in some cases the individual employees. So remember as we are discussing this subject, that one has frequently in these matters three parties to contend with and their interests are not necessarily the same and indeed in some cases their interests may be in conflict. That is becoming increasingly one of the more difficult tasks for an arbitrator to straddle a neutral line as between these three sometimes competing parties.

Now, I have been talking at this point in somewhat airy generalities. Let me try and narrow the focus for you and let me try and put it into practical terms. The subject matter of a grievance and subsequent arbitration may include any matter that arises out of the administration or application of the agreement. And the subject matter, if you read the reported arbitration cases, varies from such matters as discipline or discharge cases to various kinds of interpretation matters: vacations, seniority, things of that nature, through to some of the more difficult and awkward problems in this day and age, the right of the employer to close a plant, the right of the employer to contract out work, and it follows that the matters that arbitrators are dealing with these days are increasingly contentious and difficult because you are dealing with the jobs of people, you are dealing with their futures in employment, and you are dealing in an environment where people and institutions are increasingly fighting for their own survival. While I am speaking rather broadly, increasingly there are two areas that are receiving attention in the grievance and arbitration process.

The first is the discipline case where an employee has been given a warning or suspension and grieves that act. Normally and increasingly because the employee is concerned, afraid for his job, is anxious to maintain a clean disciplinary record, and therefore wants that matter wiped out.

The second area is what is known as the job competition area. The seniority problem, the job posting situation, where a position is posted in a plant and three or four employees apply; only one can get the job and the other two or three people grieve. Difficult, contentious issues frequently with no black or white answer, but for that very reason vitally important to the people concerned because one is dealing with their employment future and understandably they want redress to an arbitrator. Let me narrow the focus even more. It is important to your understanding of this process that you appreciate we are talking about rights and obligations that flow out of a collective agreement. We are not talking about rights and obligations in the abstract. The rights and obligations must be found within what is called the four corners of the agreement. If an arbitrator cannot find such a right, then he is without jurisdiction to deal with the dispute.

Let me give you an example of an actual case. An employer had in a large metropolitan centre in Ontario, if you will pardon the expression, a large factory, rather archaic, and the employer decided to rebuild the factory and to extend the plant in one direction. The only direction that was available was the employees parking lot. So the employer merrily went about his way, rebuilt the plant facility and of course as a result, no employee parking lot. Well in downtown Hamilton that was a serious problem indeed and the employees, of course, were seriously affected. They either had to park in the street and walk a significant distance to the plant, or in the alternative they had to park at their own expense in a municipal lot; so a grievance was filed. This matter went through the grievance procedure and ultimately an arbitrator to decide the issue.

Now as I stated to you the first thing the arbitrator had to do in that situation was to examine the collective agreement and decide whether or not there was under that agreement any right to free parking that the employees had or corresponding obligation on the employer to provide parking facilities for the employees. And that issue had to be resolved by an examination of the words in the agreement. Ultimately in the result the employer found that there was no obligation contained directly or indirectly in the agreement and he found he had no jurisdiction to deal with the matter; so that is the legal side. If it isn't in the agreement, you lose assuming you are acting for the union or the employees in that situation. But of course that begs a very large and a very central part of the entire labour relations scene and that is there was still a large labour-management problem. Because while the employer could gaily wear his legal hat and say "gotcha," you have got no proper grievance. Employees could turn around and say, "Yea, but we are pretty ticked off with you and pretty angry and pretty bitter." Now the moral of this rather rambling story is to remind you perhaps strangely coming from me, that you ought to recognize that there are in many of these matters a legal and technical issue. But don't be blinded by that fact, don't be unaware as an employer that there are serious and difficult labour management problems and you may regret the fact that you may win that arbitration on these narrow technical grounds but you may have a much worse labour management problem as a direct result.

Let me give you another example. An employee in a factory in B.C. went moose hunting. He was given a leave of absence, off he went with one of his colleagues and, in due course, transpired that the friend of the employee got lost in the bush. So the employee quite understandably was upset by that. The R.C.M.P. were called and the search took place and lasted for a number of days. Finally and thankfully the lost hunter was found unhurt; the employee, as soon as he got out of the bush, jumped into his car, drove all the way to Vancouver and reported for work. Well, by this time his leave of absence had expired and it had expired in excess of three days and the relevancy of that is, that under the collective agreement there was a provision that if an employee overstayed a leave of absence by three days, the employee was deemed to have been discharged. So when the employee showed up he was told by the foreman, "You've been discharged." But the employee said, "I've been back in the bush, I was trying to find my friend and I had no access to phones; surely that is a reasonable justification." The employer said, "We don't care, that's what the agreement says, you are gone." Well, in due course, that matter went to arbitration and the arbitrator, with great regret, agreed with the employer. The arbitrator said, "That's what the agreement says, I have no right as an arbitrator to change the bargain that the parties made and, therefore, I find that the employee has been properly terminated by reason of the application of the agreement." Now that sounded very harsh from a legal point of view, but as the arbitrator stated, he had no alternative. The following day all the employees in the plant walked out on strike. The strike lasted for about six weeks. It was full of violence and tension. Ten years later there is still anger and bitterness in that plant, and the labour management climate was irreputably damaged by reason of that act of the employer. Legally, the employer was right from a labour relations point of view but as charitably as I can, he was stupid.

May I remind you again of the importance of marrying the legal technical considerations that we will be discussing throughout the day with the overriding fact that you still have employees that are working for you and will continue to work for you, and you still have a trade union that you have to deal with on an ongoing basis. Therefore, you had better be careful that you don't win a very small battle in terms of a given grievance or arbitration matter, but lose a major war in terms of the conduct of your labour-management affairs.

Now my final observation to you in this general introductory part flows from something I have already said to you, and that is from the arbitrator point of view. He, the arbitrator, or thankfully she, the arbitrator, increasingly women are getting involved in this field and that's salutatory because they have straightened out a number of ideas that we males have had for too long, looks at the collective agreement and the arbitrator is powerless, is impotent to change the words that the parties themselves have chosen. You negotiate the agreement, you write the agreement at the bargaining table, you execute the agreement, the arbitrator interprets the words that you and the union have chosen. The arbitrator has no right, in fact, legally the arbitrator is wrong if he/she goes outside the agreement and tries to find, say from minutes, that the parties made during the negotiating process what the parties might have intended by the language they chose. Briefly stated, the arbitrator is restricted to the interpretation of the actual words in the agreement; notwithstanding what the parties think they may have said.

Now apart from the work I do in this particular field, I have spent too many hours and days at the bargaining table, and too many lonely moments at three or four in the morning after bargaining all day and most of the night trying to draft with care and precision words for an agreement based upon a settlement that the parties have achieved; not to recognize how difficult a task that is for an arbitrator. If it is any comfort to you, I've been in a number of situations where the words that I myself drafted, because I was there, I did the bargaining for the employer and I was asked to prepare the formal language, were then interpreted by some ingenious person on the other side, and ultimately by the arbitrator and I am told that's what the words say. And yet I can assure you that I had no such intention when I put those words down on paper, but that doesn't matter. It may seem strange but it is true that the arbitrator will hold you to the consequences of the agreement that you have drafted and I happen to think that is a good thing. Because if it were otherwise, if the arbitrator was able to redraft an agreement because he, the arbitrator, thought that one party or the other had made a bad bargain, then there would be no end to the negotiating process and parties would be able to avoid the very bargain that they made at the bargaining table. So you ignore the language of your collective agreement at your peril.

I can recall one situation where a client came in to see me a few years ago and he explained his problem and I looked at his agreement. I said to him, "Look this is one of the most badly worded agreements that I have ever read from an employer's point of view. You have given up every right that I can possibly think of under the agreement. The trade union representative must have done a tremendous job in persuading you to agree to this kind of language." He said, "Well, not really; what happened was that the union representative and the union committee came in to see me at the beginning of the negotiations, gave me this draft agreement and I said, well, I don't understand all of this language stuff." The union representative said, "Don't worry about that. I'll tell you what I am going to do. If you will sign that agreement that way, I am going to take 25¢ off every one of those wage rates." So this poor misleaded soul said, "Well, that sounds like a pretty good deal; that's what I'll sign." And that's what he did. Well, notwithstanding what I have said to you, neither I nor the arbitrator in question have very much sympathy for that employer. He'd done exactly what he shouldn't have done, of course. It follows that he had to be held to the consequences of the agreement that he had made.

So one of the things you may want to do when you leave this conference, is to take a close hard look at your own collective agreement and give some consideration to what is going to happen if this particular article is taken to arbitration. Is it clear? Does it set out in unambiguous terms the obligation that you think you have assumed; or is it language that was drafted a number of years ago and is now in conflict with some other article? Is it language that was just hastily thrown together at three or four in the morning and the parties got a vague understanding of what it means; but who knows what the arbitrator will do with it? The simple proposition I have asked you is that this whole subject begins and in many cases ends with the words of the agreement and the arbitrators ruling on those words.

Let me conclude this subject with another example of perhaps rather graphically makes the point. Air Canada has a system whereby the stewardesses, the air flight crew, bid on the basis of seniority for block flights; that is, they bid for a month ahead on the flights that they want to fly. Obviously in the dead of winter, the air crew want to fly to Barbados; they don't want to fly to Moncton. Because seniority applies, if I may be sexist briefly, that is why the older stewardesses are flying to Barbados and the younger ones to Moncton. However, I grasp in this particular matter and this occurred about eight years ago; there was a bargain dispute concerning the language in the Air Canada agreement with respect to this block bid system. The parties at the bargaining table were unable to work it out, and in due course, the matter was referred to a conciliation board. In due course, the conciliation board handed down in writing recommendations to the parties which recommendations incidentally were unanimous; that is, the Air Canada representative signed the conciliation board report. One of the important parts of that report dealt with this very subject. The board recommended certain language changes in the agreement and explained in written form the reasons for the language changes and what the board intended by the language changes that the board had drafted. The parties then picked up that language, signed a collective agreement, and they did so using that exact language that the board had drafted without changing one comma. Several months later, a grievance was filed in respect of this language, and the matter went to arbitration. The union, at the hearing, said to the arbitrator, "Your task is to interpret the language that the parties used in the agreement in order to understand what the parties intended." The union went on to argue, "Here we have the conciliation board report and here we have in written form the intention of the very persons that drafted that language; namely, the conciliation board and that language supports us and the reasoning is contained in the report and we want to introduce it into evidence so that you have before you the actual evidence of the actual persons who actually drafted the language that you have to interpret." Now that sounded very persuasive. The employer on the other hand said, "No, you, Mr. Arbitrator, cannot go outside the collective agreement. You are restricted to the words in the agreement and you have to interpret those words without assistance from any source as to what might have been intended and if you allow into evidence that sort of information, it follows that either or both parties can introduce additional evidence as to who said what at the bargaining table, what either party intended when they agreed to that language, and so on."

Not to keep you in breathless suspense, the result of the case was that the arbitrator said, "No, I am not prepared to admit into evidence the report of the conciliation board. My task is to read the agreement, to examine carefully the words that the parties used in the agreement, and then I have to try and interpret as best I can what the parties said. I am not going to allow any what are called extraneous documents, any material or any evidence outside of the agreement as to what the parties intended by the words they used in the agreement. The agreement speaks for itself, and that is what I am going to interpret, and that is what I am going to apply." That completes the general overview that I wanted to give to you.

Now let me turn to the first of the topics that I want to discuss, and that is the grievance. Let me begin with a somewhat simplistic point, but it is an important one, and that is that the arbitration case is merely the tip of the grievance iceberg. Behind the arbitration case invariably is a much larger number of grievances so in the Ontario scene in the private sector while I have told you that there will be approximately 2,800 arbitration cases, while no one has any accurate figures, the number of grievances that are dealt with by the parties in the private sector in one way or another would be at the very least in the six figures. Remember that these grievances of course can be and are disposed of in many ways; some are dropped, some are abandoned, some are settled, some are left dangling, and we will be discussing all of those concepts.

Throughout what I am not going to discuss with you, the theme I want to put to you is two-fold. Firstly, the purpose of dealing with the grievance is to try and resolve the problem and to avoid arbitration. Because, I put it to you very bluntly that it is on balance preferable, regardless as to what side you are on, that the parties themselves resolve their own dispute rather than to put the matter in front of a third party. That third party, that arbitrator, may and not infrequently, does give a decision that no one is happy with, and that indeed creates far more problems for the parties than the parties themselves anticipated. That is the first matter and the second part is a reminder again, and you will be hearing this ad nauseam that the grievance and the handling of the grievance is just part of the ongoing relationship, not only between institutions, not only between the employer and the trade union, but I put it to you, between individuals. And remember please, that we are talking about the dynamics of human behaviour. For example, what is said and done in a grievance procedure meeting may have a lasting effect not only on the relationship but ultimately perhaps on the collective bargaining relationship. If you are an employer and you embarrass say the local union president in a grievance meeting; you tactically may gain some small brownie points but remember that two or three weeks from now you may be sitting down with the same person at the bargaining table. Memories are long and that person understandably is resentful and therefore you may have created for yourself, as an employer, a much worse problem.

Alright, my first proposition to you is that the subject matter of the grievance must first be identified before the problem can properly be resolved. Now that is the kind of observation that I say to my teenage kids; their eyes glaze over; they say, "Oh God, there he goes again!" But you know there is some common sense in what I am trying to say to you. If you think of these matters in rather basic terms, I think you are going to be a much more effective practitioner of the rather arcane art of labour relations. Grievances are frequently drafted by persons who are not terribly articulate, who are not frequently very conversant with the precise use of the English language, and therefore the starting point regardless as to what stage of the grievance procedure you're at is to look at the grievance and say, "What is the problem?" In my experience it is astounding how often it transpires that the grievance appears to say one thing and by the time you get to arbitration, you learn regretably for the first time that wasn't the problem at all. The problem was very different from what appeared to be the matter contained in the agreement.

In one recent example, there were a number of grievances filed by a number of female employees in a given plant and in each case they appeared to be complaining about reprimands and warnings that they were given by a male foreman.

In the face of it, those individual grievances appeared to be rather simple to understand. But what lay behind the problem was a much more serious matter and that was the overt sexual harrassment by this foreman of a number of women in this particular plant. And until that problem was identified and dealt with, there was no way the employer could properly deal with these grievances because while they appeared on the face of it to be dealing with a relatively minor disciplinary matter; they in fact, dealt with a much more substantive and critical issue to the entire welfare of that plant.

My second proposition to you is that it is not enough for you as practitioners, regardless as to whether or not you are on the union or the employer side, to come to a conference like this, hear someone like myself pontificate at length on these matters, go away and say to yourself, right now I have got a pretty good handle on this subject, without translating into action, and by that I mean, instruction and direction, some of the things that we are talking about. I don't know of a more difficult and lonely task than to be a first line supervisor in any factory or plant or hospital or operation. Increasingly, there is an awareness on the part of employers of the difficulty that such persons have without giving them some help and some guidance on the dynamics of labour relations and on the people handling component of their job. You are going to be seeing an example of that in the arbitration film that I will be showing you. But apart from that example, I can assure you that so many of these grievances that end up in arbitration begin because of mishandling of a problem at the first-line supervision level and not because the first-line supervisor is a no-good SOB, although that occasionally is the case. But more commonly because the first line supervisor is simply ignorant of the basic principles of how to deal with people in a labour-management setting, and if that is the case, that is not necessarily that persons fault. The real failing is that of the employer who hasn't tried to give direction and guidance to that person. I put it to you if you go back into your plant and you say to a given first-line supervisor, "What is the first step in the grievance procedure? Who gets the grievance at the first stage?" I'll bet the foreman doesn't know; I'll bet he hasn't got a clue. Or if you ask him, "How should the grievance be answered? What should be contained in the answer?" No idea. These are simple things that if you follow what I am trying to convey to you, will--I think--significantly improve your labour management relations.

On the union side there has been a recognition of this proposition for some time. Some of my friends in the CBRT, and we talked about this last night, will recognize the importance of the ongoing educational efforts made by that union and by so many other unions in guiding and instructing stewards, committee persons, in the operation of the grievance procedure and in the dynamics of the labour-management relations.

Unfortunately, management has been well behind the times, although thankfully things are improving with this kind of a conference. However, as I have said to you, don't leave these matters here. If you think I have given you some useful help, try and take those ideas back into your factory, back into your hospital, back into the operations that you have responsibility for and talk with the first-line supervisors, because they are the people who need the kind of help that we are talking about. They are the persons who deal with the matters in the first instance.

Alright, my third proposition to you is that in dealing with these grievances, try as much as possible to keep your emotionalism out of the matter. Try and maintain your objectivity, try and recognize that occasionally management can be wrong, and try and remember that in the long run it is probably preferable that you admit that fact and you correct the problem. Now I am the last person not to recognize the high degree of emotionalism that pervades this entire field. All you have to do is look at my hairline and you will recognize that fact. As my son said to me the other day, "Dad, what you've really done is rearranged your hair." I thought that was a cheap shot if I ever heard one. The fact remains that grievances are not going to be resolved, problems are not going to be settled, if you allow these matters to be dealt with in a highly charged and highly emotional atmosphere, so do what you can. Again, regardless of what side you are on, try to defuse the problem and try and lower the emotional temperature as best you can.

Alright, let me turn from those rather broad propositions to some more narrow subjects. Firstly, most agreements identify in the language of the agreement what is the proper subject of a grievance. If you look at your section 36, you'll see that there are five different headings and your section is comparable to that of most jurisdictions, and usually those subjects break down into one of the following: a dispute concerning the application of the agreement, a dispute concerning the administration of the agreement, or a dispute concerning an alleged violation of the agreement. Again, as I have said to you a number of times, it's a dispute concerning the agreement, key words being of the agreement.

The second issue is that most agreements provide for a grievance article as distinct from arbitration article. What I am talking about now is the mechanics of how a grievance is filed and how it is processed through the grievance procedure before it gets to the ultimate stage, specifically, the arbitration stage. Now just out of interest, do any of you have a collective agreement that you are involved with that doesn't have a grievance article in it? O.K., in my travels I have yet to run across such an agreement, so I'm not surprised. However, and in this business there is always a however; there are as many variations as there are agreements on what is contained in the grievance article. It is not my purpose to try and outline a model grievance article, partly because I don't know what that is but more importantly it is because a grievance article should be structured by the parties themselves to solve the kinds of problems that they have to deal with in the context of the particular operation. I will say to you that my experience has been that there are too many complex, convoluted grievance articles; for example, there are too many steps built into the grievance process before you get to arbitration. I happen to think that a number of these articles could be shortened and streamlined and would work more effectively as a result. But notwithstanding what I have said to you, if your grievance process is working, great, stay with it. If it isn't, if you are not satisfied with it as a mechanism, then what I am going to say to you may be useful to you.

First thing you have to do when you look at the grievance article is to say, is it clear, do you understand what those words say? More materially, do the people that have to deal with it, the employees, the stewards, the committee persons, and the plant, do they understand it? Is it written in language that lay persons can understand and grapple with? Because if it isn't, it should be. Secondly, there are certain things that in my rather strong view should be included in the grievance procedure regardless as to whether or not it is a large plant, a small hospital, or any other operation. There must firstly be a definition of what's the proper subject matter of the grievance, and I dealt with that. Secondly, there must, I suggest, be built in, an orderly system of time limits for the filing of the grievance and for the processing of the grievance at each stage of the grievance procedure. Now let me stop and deal with that subject.

I have said to you, you must be careful of wearing your technical hat and you may say, "Hey, he is contradicting himself." Well that is not the first time I'll do that, but I assure that it is in everybody's interest, labour and management, that there be an orderly system for the processing of grievances within realistic and reasonable time frames. Because if there isn't, the process as a process will not work. Human nature being what it is; people will stall deliberately or otherwise. The problem will fester and frequently grow and the subject matter of the grievance will expand and everybody loses. Now I do not say to you that these time frames should be so short as to mean that the parties have no time to properly deal with the matter. But assuming for the moment that there is a discharge of an employee, it is in everybody's interest that if that employee chooses to grieve his discharge, that it be done immediately within a specified time frame, and correspondingly that the employer has to reply to that grievance within another short period of time; and if unresolved, that matter be put to arbitration, again within a specified time frame so that all parties, all participants in this process know where they stand.

How long is reasonable? I don't know; I think that depends on the parties and it depends on their relationship and it depends on their maturity. I don't, myself, have any terrible hangup on this subject because of course even though you specify time limits, even though you say as an employer we've got three days to answer the grievance, it may be appropriate that further study take place. You have to investigate the matter more thoroughly; three days isn't long enough, that's no problem. That is, it is no problem provided you go to the union and you agree mutually to extend those time limits. As a footnote, if you do that again regardless of what side you are on, I suggest to you that you put that into written form. You simply write a note, it doesn't have to be any formal document, simply stating that we have agreed to extend the time limits for answering the grievance of John Smith to Friday, the 13th of November. That is all that is needed. My point to you at this stage is don't leave these loose ends dangling. Try and bring as much clarity and documentation to the orderly managing of the grievance procedure, and I use managing in the best sense of the word. That should be your objective. You are trying to resolve problems, but you can't resolve those problems unless you have a mechanism to resolve them. But that doesn't take you far enough; you also have to manage that process, but that doesn't take you far enough either. You have to manage the process along with somebody else; namely, the other party to the agreement.

A third subject is to examine whether the grievance can be filed in written form at the first stage or can it be put orally and how are the answers to be given--orally or in writing. Well, first of all there is nothing to perclude any party, any employee, regardless of what the grievance procedure says from raising on the shop floor a given matter. In fact, that probably should be encouraged. Well, if that is so, then by in large the grievance procedure should be concerned with those matters that can't be resolved at that informal stage where the employee talks to his foreman and says, "Hey, how come I didn't get my overtime last week?" Therefore, it is my view that the grievance procedure should begin with the proposition that the grievance must be filed in written form. I also submit to you that the answers should be in written form at each stage so that ultimately if the matter is unresolved and the matter gets in front of an arbitrator, there is a paper trail that the arbitrator can trace beginning with the grievance and following through the various steps of the grievance procedure so that the arbitrator has in front of him all the appropriate documentation as the historical background of how the matter got to him. And for that reason it is appropriate, I suggest, that these matters be reduced to written form at each stage.

Now that brings me to a subject I want to talk to you briefly about and that is how to answer a grievance, because some of you are on the management side and therefore I'm sure many of you have had that problem, but what do you do? Well, there's a simple formula that I think will help you and that is say as little as possible in written form and say as much as possible orally.

Can I share with you firstly a compliment I was given from a gentleman named Mr. Shields, who was kind enough to come up to me and say, "You are the first lawyer I have met who talks English." That reminds me of some negotiations I was in, and at one point in my checkered career, I was educated in part in Montreal and I learned some French, not a great deal, I regret to say. In these negotiations a committee man on the union side who was French Canadian got quite carried away and he started speaking French and I tried to respond to him. Finally, he had enough of that and he looked at me and said, "I don't like your English, all you say is no, and I don't like your French, because all you say is no." Either way I was in difficulty.

Let me try and first of all give you the legal theory and then I will come back to the practical side. As far as the legal theory is concerned, the formal answers become part of the arbitration record; that is, those formal answers are presented to the arbitrator and form part of the arbitration proceedings. So it follows if you are going to put it into written form, if you are going to put some facts into written form or your submissions or representations in written form, you had better be able to stand behind them or you may find yourself locked into a position that you don't want to maintain in front of the arbitrator. Therefore, you should be cautious in what you say in terms of the formal written answers. But without sounding sarcastic or contradictory, it really doesn't matter very much what you say in written form because the major part of the grievance procedure is the dialogue--the discussion between the parties. Now from a legal point of view, I am sorry to be dumping these phrases on you, but you should know it, in a word those meetings are privileged. What that means is that neither party is entitled to tell the arbitrator what they discussed during the grievance meeting. Therefore, the parties are free to exchange ideas, proposals for settlement, in the grievance meetings without any fear that at the arbitration hearing one side or the other will say, "Look, such and such a proposal was made for settlement." You can appreciate, if for example, your union person and you are dealing with a discharge case and you said to the employer, and I am talking in the grievance meeting, "We recognize that Joe shouldn't have done what he did but he is a long-service employee; you over reacted, you shouldn't have fired him but we are prepared to accept a suspension, and that will wipe out the matter." You would be very reluctant to make such a suggestion if you thought that at the arbitration hearing the employer could come along and say, well, in the grievance meeting the union offered, on behalf of the grievor, to settle the grievance by means of a suspension; and therefore they are not precluded from saying there was no offence in the first place. You damn well keep your mouth shut, you'd have to in order to protect the interests of all parties. Well, arbitrators recognize that and properly so, and therefore you, regardless of what side you are on, you are free to talk orally to as great a degree as you wish to exchange ideas and proposals and try and settle the dispute. That's the place and that's the time and the way in which you want to try and be expansive and you want to be full and complete.

Now that brings me to the next subject which is the management of the grievance meeting. And again I am talking about this from a non-particant point of view, and what we are going to talk about obtains regardless as to whether you are union or management. You start with the proposition that the purpose is to solve the problem. But even more importantly, is the fact that before you solve the problem you have to identify the problem. Now many of you have attended grievance meetings and many of you have gone away from those grievance meetings saying, what a fiasco that was! The reason I suggested that, is that it wasn't really a problem-solving exercise, it was a debate and you and the other side sat down and you tried to score debating points of each other, and you had fun in some cases or in other cases you ended up thoroughly frustrated but in either event you weren't really trying to solve the problem; you were too busy involved in the gamesmanship and you were trying in a word to win a debate. You were talking not with each other but at each other and there is a world of difference. So, what am I trying to say? Well, the first thing you do in a grievance meeting regardless as to what stage you are at and regardless as to what side you are on as you say to your counterpart, let's agree on what the problem is. Let's identify the problem and go further once you have identified it, then pin it down and agree that you agree on what the problem is. Then you can address the problem. Trouble is most people proceed backwards. They are so busy trying to score debating points; they are so busy nattering at each other, that they forget the first step and that is to figure out what the problem is. I don't know how you can solve a problem until you first identify it, but that is indeed what happens. I think that is one of the central reasons for the failure in many cases of these grievance meetings.

The second point I make to you in the orderly management of these grievances meetings is a shot at management. You on the union side are probably saying it is about time he did that. My thesis to you is that too many managers are too full of industrial relations secrecy. They are reluctant to tell the other side anything about the matter. They say, "Well, why should we tell you about what happened. We'll see you in the arbitration arena." They are too concerned about revealing facts and information because they fear that may prejudice them. Let me give you an example: Assume an employee has been terminated as a result of an absenteeism record, not an uncommon difficulty these days. Now in the first place in the real world of labour relations that employee has gone to his/her union representative and has advised the representative that, "I've been fired." "Why?" "Because of absenteeism." The question the representative asks is, "What is your absenteeism record?" Well the employee says, "I have missed the odd day but no more than anybody else; my records pretty good, in fact." Well, why should the representative disagree with the employee? The representative doesn't know any differently. So naturally starts with that premise, that the employee has been badly treated, so the representative walks into the grievance meeting loaded for bear. Now in the grievance meeting the representative says, "Why was Mary Jane discharged?" "Well because she has got a lousy absenteeism record." "Well, show me the record." "Oh no, we can't do that." Well, as managers, what do you expect if the union says if that is the way you are going to do it, we will see you at arbitration. Why not reverse what I've said. Why don't you as an employer say, "What's in dispute?" "Her absenteeism record." "Why shouldn't we reveal that information; what is secretive about that; what's indeed in dispute about it?" In fact, aren't there serious advantages to be gained from putting that information on the grievance table and saying here is her record, you judge for yourself. Now the phychology has changed; now the representative is saying to the grievor, "Hey, wait a minute, you told me you had a pretty good record." What about these figures, maybe they are incorrect in which event it is straightened out right then and there; but maybe they are quite correct, they probably are. Now the problem is significantly reduced because you are arguing, you are discussing from the same factual base and that is really my point to you.

In the management of the grievance meeting, as much as possible, you want to assure you and the other side that you are discussing the problem with the same facts. God knows I am not naive; I am a number of other things, but that I am not. There are certainly circumstances and situations, because of the political nature of the problem, where it is simply inappropriate to get into a lot of facts where both parties necessarily know the matter can't be resolved in that meeting, in that form, at that time. Fine, if that is your perception, then by all means don't get expansive in terms of the information you provide. But in too many cases, management is much too secretive in terms of the information they provide in a grievance meeting.

The third point I make to you is try and manage that meeting in an unemotional way; try and keep the parties and the participants talking in a civilized and constructive way. I don't mean one has to adopt elegant drawing room manners. I am saying to you that these problems by in large are difficult enough to solve without having people emotionally taking cheap shots at each other; not only because it is likely to bring about antagonism during the meeting itself, but also because all it's going to do I suggest is exacerbate tensions and problems between parties, and people go away from the grievance meeting angry and antagonistic at each other. And that is going to impact, not just in that problem, but in terms of all their relationships. So, don't take cheap shots at people. It's terribly simplistic and awfully trite, but you know the golden rule does apply in labour relations. I'm never ceased to be amazed sometimes at how people that are normally civilized, sensitive human beings turn into something else when they get into a labour-management environment. I think that is unfortunate; in fact, in some cases it's tragic. It is the reality and as much as possible I think we all should learn from that.

Before we show the first tape, I want to jump to another subject in terms of this grievance meeting. I've said to you, you want to try and manage this meeting again in the best sense of the word in order to achieve a result; namely, a settlement of the grievance. But let me add a few cautionary words to that subject. If you are able to reach a settlement of grievance, please put it into written form and do it then at the meeting. Don't do what so often happens--agree to reach a general understanding of the matter or agree that you have reached an agreement in principle, whatever that means. I have never understood an agreement in principle; you've either got an agreement or you haven't. What's this "in principle" business? Put it into written form; it doesn't have to be any complex piece of paper; you just sit down and you recite what were the terms of the agreement and if you can't do that, you haven't got an agreement in the first place. And if you don't put it into written form, what will happen, I assure you, is that the parties who go away and one party or the other will change its mind; or when it comes time to implement this so called settlement, one or the other party says, "Hey, wait a minute, that isn't what we agreed on." So again, put it into written form.

There is a further dimension, I told you earlier that there are three parties to most of these disputes: employer, trade union, grievor. Get all three parties to sign. If you are a trade union representative, the last thing in the world you want to do is to be put in the position where you are accused by the grievor of making a sweetheart deal with the employer. You may be subject to prosecution; you may be subject to internal problems under your own union constitution and you certainly are subject to all sorts of criticism and you should not put yourself into that kind of situation. From the employer's side you may find yourself in a situation where the grievor takes the position, "I don't care what you and the union agreed to, I still have my rights and I want to go to arbitration." I told you at the beginning that I wouldn't turn this into a legal lecture, and I won't, but I am obliged to make a point to you and that is that there are generally two kinds of grievances and one has to recognize the difference between them. One is what's generally known as a policy grievance. That's a broad interpretation issue, but effects some or all of the employees in the bargaining unit. It's a matter of general application. It may be filed by the union as such depending on the agreement; it may be filed by an individual employee or group of employees, it doesn't matter. In those situations it doesn't really concern me that the individual grievor doesn't sign the memorandum of settlement or the document of settlement; although, I think that is good practise. What is much more difficult is what is called an "individual grievance," and that's a matter that affects an individual employee's employment rate. The easy example is the discharge case. That is the kind of case where you have to be very careful to ensure that all parties to the alleged settlement have signed. In case you think all of this is theoretical, let me give you a fact situation, an actual case.

An employer who was a bartender in the Guildwood Inn in Sarnia, Ontario, went out on a party off ship and got hammered. On his way home, he decided he would go into the Guildwood Inn, parked his car and he sort of weaved his way sort of unsteadily into the lobby of the hotel. There at the desk was a charming young lady who was registering and he walked up to her and patted her on the bottom and he said, "You are a knockout, I've never seen you in town." And he had a number of suggestions as to how the two of them would spend the next few hours. She didn't take very kindly to any of this, called the manager, and the manager came out and he fired the employee right there on the spot. The employee filed a grievance and during the grievance meeting the union and the employer went at it hammer and tongs and they discussed this problem and finally the grievor interrupted and said, "Well, look you people tell me my grievance is going to go to arbitration, I've got a couple of questions to ask. Tell me, is this a hearing in which evidence is heard?" "Yes." "Is it a public hearing; can anybody show up and listen to what's being said?" "Yes." "Does the arbitration take down all the stuff?" "Yes." "Does he put it into a written form; is there an award that anybody can read?" "Yes." "Good God, my wife will kill me!" So the employer was not unsympathetic to the problem, for reasons I won't address, said, "Well, look enough is enough; tell you what we'll do, we'll demote you, we'll give you a suspension, and we'll put you as a bartender in one of the other Inns that we operate. It's not quite as good a shift, but if you keep your record clean, we'll bring you back on your old job within a couple of months." The employee said, "That's marvelous, that's great," and he said, "I accept," and the employer wrote out this and the employee signed it. The union representative said, "Just a minute, you can't do that to an employee. He was on his off shift, you as an employer have no right to impose any discipline for anything that takes place after hours. This is an issue that affects all the employees in the bargaining unit, it could have happened to any one of us. Therefore, as far as we are concerned, we don't agree to any settlement and we are going to arbitration. We want this matter arbitrated as a matter of principle." Well, to make a long story short, the matter came on before a well known arbitrator, named Earl Palmer, who was an old friend of mine and I had the task of arguing the matter on behalf of the employer. I took the position with the arbitrator that the matter was settled and I filed the document and said, there's no issue to hear, called evidence as to the fact of settlement and ultimately persuaded Mr. Palmer that he had no jurisdiction because there was no grievance. The matter was settled; it was an individual grievance. End of discussion.

There are two morals to this. The first is be careful when you do that because after the case was over and after Mr. Palmer had given his ruling, he said to me, "Sanderson, you and I are going to have a drink together." He said, "Well look, I have given my ruling and it's all over, so tell me what the case was all about if I had heard the evidence." So I did, and he looked at me with a straight face and said, "You know I've been an arbitrator for quite a few years and I hear all of these cases that deal with seniority problems and interpretation matters and all of these dull things and finally we get a case with some sex in it and you persuade me I haven't even got jurisdiction to hear it." Mr. Palmer is still a bit bitter about that.

The second and more important moral is that while the Guildwood Inn is legally good law and stands for the proposition that an individual grievance once settled by the individual no longer exists, there is interestingly a line of cases that go in precisely the opposite direct and there is a case by Paul Wyler in an Enco decision that says exactly the opposite to what Palmer said in the Guildwood case. So when we come to the afternoon session, I will have something to say about the fact that there is in the jurisprudence a case to prove literally any point or any proposition that you want to make. Back to my point to you at this stage--in order to avoid exactly that kind of problem try and get agreement on the settlement, reduce the agreement to written form, and get the representatives of all three parties including the grievor to execute the document and that will avoid the kind of problem that we have been addressing. Alright we're going to be putting on the tape. Before I do that, let me just introduce it.

In 1974 when we were all younger and I had more hair, the University of Toronto decided that they would try and put together an arbitration film that would show the real world of arbitrations. The tape that you are going to be seeing, I assure you, is modeled after a real case and the participants in the tape are professional actors as well as the actual council who argued the case and the actual board members. The purpose of this was to try and make it real; so nothing that you will see in this first part of the tape is invented. The two or three actors were asked to play a role; they were given not a direct script but they were given the facts of the real case and asked to perform realistically what transpired in the plant that brought about the actual arbitration case. The decision, in case any of you are interested in, it is the Galco Food Case, which is reported in the LAC's. This first tape is in two parts; the first shows the incident in the plant and what I want you to do if you will, is to look closely at what happens and ask yourself a number of questions. Firstly, what did the grievor do wrong, and what would you have done if you were responsible for making a decision? Secondly, in your view, did the employer do an adequate job of investigating? Thirdly, in your view, what did the foreman do wrong, if anything; and finally, if you were the union representative, how would you have reacted?

Now the second part of the tape deals with a mock grievance meeting and the two participants in that tape are firstly the Canadian Director of Labour Relations of American Can Co. and on the union side, John FitzPatrick, who is the area district representative for District 6 of the United Steel Workers of America. Both of these persons have been in hundreds of grievance meetings and they were asked to portray how a grievance meeting actually takes place. It is, as you will see, no model as to how it should take place but I think rather graphically it makes, at least in part, a point that I have made to you in terms of how not to manage a grievance meeting. In any event, you can form your own judgements and I'll have something to say about that after you have seen the tape.

PRESENTATION OF FILM

This program has been produced in order to give a brief insight into the process and system of labour arbitrations. It is not intended as an exhaustive study, rather it illustrates a typical grievance case resulting in a dispute between management and union. It includes the preparation of the case by the company and union lawyers and finally the case being presented at an arbitration hearing before a chairman and two nominees.

Edna (E) - "Hey, Polly, Polly. Polly you know I have an anniversary today, seven years I have worked here. Seven is a lucky number, isn't it?"

Foreman & Supervisor (Aside) - "I wish you would tell her." "What's the matter, are you afraid of her?" "She may get mad, once ..." "Come on, I'm running a factory not a nursery school. Now, look if she gives you any trouble, let me know."

E - "Ah, you need to be good today, you always want to speak out when I am into ... I show no trouble today, now remember."

Polly (P) - "You know they put people away for that ..."

E - "Hey Polly, meet Lilly, she's a big woman; she's foreman of this whole section. ... meet Polly."

Lily (L) - "Yea, I know Polly. Listen Edna."

E - "Have you come to bring me a good surprise, huh."

L - "I guess I brought a surprise."

E - "Ah, you see, Polly, she remembers my anniversary."

L - "Edna, you are moving to trimming lines."

E - "What!"

L - "They say you have got to move."

E - "Who says I've got to?"

L - "Mr. Mason says you got to, that's who. Come on."

E - "Mr. Mason says to, just like that. What do you think Mr. Mason is, God? Mr. Mason, are you God? ... I'm not making a noise, I've worked for seven years on the job. ... How long will I stay on trimming line? Who is going to take my place on packing line?"

L - "Somebody else, O.K."

E - "Oh! Wait a minute, I am going to make less money on this line, ten cents an hour less."

L - "What can I do?"

E - "What can she do? Well, there is something I can do. Well, Lilly."

L - "Yea."

E - "Come here, I want you to write out a grievance for me. Here you write it out for me. O.K., I'll take it to Mr. Mason. I'll make a bet she knows some reason, is my packing no good?"

(Five minutes later) -

Mr. Mason (M) - "Edna, hey Edna, come here."

E - "Yea."

M - "What is this piece of garbage you left on my desk? I know what your game is and I don't like it."

E "You throw that away. You throw away my grievance like you throw away me."

M - "Come on Edna, nobody's throwing you away."

E - "Do you know what is in that paper? Seven years of my life."

M - "You are getting upset over nothing."

E - "Nothing, huh! Well, give me a reason for putting me off my job and put me on trimming line, eh?"

M - "What's wrong with the trimming line?"

E - "Ten cents an hour, that's what is wrong. You know that means two loafs of bread my kids don't get."

M - "Look, your work is getting behind, the work is getting behind and I've got to cut this conversation off, now. ... Edna is a little upset, but she is going to put down that knife."

E - "Oh no, I am not."

M - "You are going to put it down now and you are going to get back to work and do your job and concentrate on that new job, aren't you?"

(Later) --

E - "Give my my purse."

M - "That's it Edna, you are going to be all right. ... So you know I've got a job to do. You'll be fine at this; you've done this before, you'll be fine."

E - "My God, no reason."

M - "Well God runs his plant, Edna, and I run mine. Remind me to tell you I know of a place where you can get some day old bread."

E - "Listen you!"

M - "I'm listerning Edna." ...

E - "You say you listen, but you don't hear."

M - "I'm listening Edna; I've said, that's all."

E - "Ah, what do you need him for ..."

M - "That's right Edna, that's right."

E - "Ah, you do me a favor so, so I do you a favor; you make me trimmer, so I'm gonna trim you."

M - "That's all Edna; that is all. Mr. Fair is waiting to see me."

E - "Come on, it doesn't hurt; ... why should it hurt you, eh?"

(Later) --

M - "Mr. Fair."

Mr. Fair (F) - "Yes Bill."

M - "I'm afraid I have a bit of a problem on the line this morning."

F - "O.K., come on down to the office and talk."

(Edna complaining to union rep)

E "Now, you are my union, eh? Well you should see what they do in this place to a steward. So, I thought I would complain, but he just throwed it away, and they refuse me. I just stand there talking to him and he push me."

(Mr. Fair & Mr. Mason in office)

F - "What seems to be the problem?"

M - "As you know, I've been thinking about making line changes."

F - "Yes."

M - "Mr. Fair, I decided to move Edna to trimming. I asked Lilly to tell her this and when Lilly did tell her, she went into a rampage. At one point she threatened me ...

She came up to me and asked me if I was God. She screamed at me all over the bloody factory, asking me if I was God. At one point she picked up her packing knife and threatened to cut my balls off."

F - "Did you explain the situation to her?"

M - "I couldn't get a chance to; she just kept on nattering in Dutch and the next thing I know."

F - "Did you stay cool on her?"

M - "I kept my cool; I didn't blow it. I just got her to go back to work. I got her over to the trimming machine; she picked up one of the packing knives and threatened to cut my balls off."

F - "She said that?"

M - "Those exact words, 'You bastard I'm going to cut your balls off, you son of a bitch.' As far as I was concerned, it wasn't violets and roses ..."

F - "Has she got to be punished?"

M - "Over there she picked up the scissors off the machine and threatened to cut off my ears. I don't know; I think she is out of her groove right now."

F - "Listen, Edna has been with us for seven years; she is in the union and we can't afford this kind of trouble."

M - "As far as I'm concerned, the company is in the clear. I kept my cool; there were witnesses around. Lilly was there; Polly was there; George was just down the line. She stopped everybody ..."

F - "Go get her and send her in here and I'll have a talk with her and straighten it out, whatever."

M - "O.K., I'll be back."

(Later) --

F - "Now Edna, I'm very sorry but we just cannot run a plant this way; we cannot have people running around with knives and scissors. Now you did threaten Mr. Mason with scissors and knives, didn't you?"

E - "Oh, I didn't hurt anybody."

F - "It's not a case of whether you hurt anybody or not; you were waving scissors and you were waving knives around. You were threatening, right?"

E "Yes, but I filled out a complaint and he throwed it away."

F - "Dear, I am sorry we cannot operate a plant that way; I'm afraid I'm going to have to let you go, that is all there is to it."

E - "I'm fired?"

F - "Yes my dear; I'm sorry you are fired and that is the end of it."

(Later with union) --

F - "... I've reviewed all the facts and discussed it with the foreman and with the plant supervisor of course and I am pretty confident that they reported the facts to me and I really see no grounds for carrying this on any further."

Union (U) - "I don't think you really looked into the situation at all. Edna, you know her just as well as I do."

F - "I know Edna quite well."

U - "Why did the foreman take her off her job in the first place? ... She is the new senior girl on the line, seven years of experience. If he wanted to take someone off the line, he could of very well have taken a junior girl. He didn't have to take Edna."

F - "Now in the process of grievance, you don't ...

U - "Number one, that is the worse possible way you could handle it. Well, how else could you do it?"

F - "Well, she has known this guy for seven years; why couldn't she talk to him?"

U - "You know as well as I do that you can't talk to that guy."

F - "You can't talk to her either; if you talk to her she will pull a knife or a pair of scissors on you."

U - "That's the foreman's side of the story. She comes in to work in the morning and the foreman immediately takes her off the job, that is one thing. The second thing is when she asked about her cut in pay, he says, 'Yes, you are going to lose pay.' Now, how does he know that? So she goes up and does what she was supposed to do. She files a grievance, her rate of pay you know for her transfer and he crumbles it up and puts it on the floor. How the hell would you feel?"

F - "Well, alright ... Why did we have to go to grievance in the first place. If she's got a problem with the guy, let her ask the guy, but don't pull a knife on him. You know it is bad enough to get a grievance without ..."

U - "That happens everyday."

F - "We've got obscenity, we've got insubordination, and I think we've got a damn good case in assault. It will be out in the civil court."

U - "Look the foreman can tell you or the manager ..."

F - "For the foreman, it's not just a normal occurrence in the plant, he had to do something about it."

U - "He wasn't upset and nothing was wrong in any way, shape or form; she did her job, she wasn't insubordinate, and she went and did the job in the trimming. Then the manager comes in and says bring her to my office and all this takes place and she is fired. Now if he hadn't stuck his nose in, nothing would of happened. It was a normal occurrence; it happens every day.

F - "The foreman read the copy; he didn't aggravate. I think he was too scared; he was petrified to do anything about it. ... Edna, I have known her a long time; she's got a temper; there is no two ways about it. I even had a report that she busted up the union hall the other day throwing chairs around. Now, we went into this in quite a bit of length, Cyril."

U - "That's news to me."

F - "Well, it's not news to me because I get it from the people on the floor and not only from the supervisor. ... but we know each other well."

U - "Well, why would the foreman pick on Mrs. Stewart?"

F - "He's not picking on Mrs. Stewart. Number one, she has to leave her job ... He wants to provide proper relief, so he wants a girl over there to train. You have people off every day of the week, absent because of sickness; you have relief people out there all of the time; everybody on that bloody department has been on that job. If he wants to have a particular person whom he can rely on, who maybe doesn't have the attendance record some of the others do, what the hell is wrong with that?"

U - "Edna's never off, ..."

F - "He's looking for someone; he saw Edna who is here all of the time ... Look, he has the right to transfer people as long as he maintains the rate of pay. If the concern is over the pay, then talk to the guy about it; don't just drop a grievance unto the desk and make him look like an ass."

U - "Well, you can't talk to him. ... She talked to him before she handed the grievance in and he just crumpled it up. Is that the way you would instruct your foreman, to throw a grievance on the floor?"

F - "That foreman wasn't particularly right. They were both a little dumb about it, but then she came at him with a knife, then I think that is going too far."

U - "Look, every girl on that line has a knife in her hand."

F - "Come on, come on, we've got the facts down. We have other employees who witnessed the whole thing and believe you me there is no reason to believe she wasn't serious."

U - "But are we to believe she was serious? She was upset; she was irrational. How much trouble have we had with a foreman before? Certainly, she was entitled to a hearing. We have had trouble with a foreman before, sure many a time."

F - "I don't know; it never got up here ..." He is trying to run a shop out there and he is trying to do the job right and I think he was well within his rights."

U - "Look, we have all the facts down; we could wrap this thing around the office ten times. I don't think there is any sense going on. You know where we have to go."

F - "O.K., fine."

(End of presentation)

Well, just a happy day in the life of Stormfill Limited. Let me ask a couple of questions of you. How many of you would have fired her? How many of you think the foreman contributed to the problem? How many of you would have disciplined her in one form or another? How many of you think the manager did an adequate job of investigating the situation? Good. I am going to leave the subject to the question period because I am sure you have a number of questions and I've got a lot of ground to cover but let me quickly make a couple of observations that may trigger some responses from you. It's a classic example of the real life of arbitration. It's like the world of divorce or marital disputes invariably; there is a contribution to one degree or another by both participants. The second thing to remember is that as in this situation, management often plays a role, major or minor depending upon your perception, and reactions bring about further reactions. For example, the foreman didn't do what he should have done and gone to her himself, he delegated. Similarly, the foreman was a smart ass; he made these extraneous comments about day old bread. Great, marvelous, just what you need in that kind of a difficult situation. On the other side, remember that she, the grievor, called the union representative and she said to the union representative, "Hey, he pushed me." Well, that didn't happen either, did it? But that's not what the union representative knows; he's on the other end of the telephone. He assumes that is true. On the plant manager's side, he didn't do a proper job of investigating at all, did he? He just shot from the hip. And as I will be discussing with you this afternoon, one of the central failings of so many management persons is that they take action before they have all of the facts. If you are careful as a manager, to investigate a problem and to satisfy yourself you have all the facts, the good and the bad, before you take any action. That alone will markedly decrease the number of grievances and problems that you have and more broadly will dramatically improve your labour management relations. Get the facts, get the information, then react to those facts.

Alright, in about twenty-five minutes I want to turn to a brand new subject and that is the preparation of an arbitration case. And the fact I am going to be spending only a few minutes on it, does not detract from the importance of it. In fact to any of you who are active practitioners, this may be the important part of this day for you. When I was a law student I was articled to a person who is now a judge of the court of appeal, Mr. Justice Arnup. He was a very active council and he made the point that 90% of all cases in court are won or lost in the preparation stage. I think that is modestly high in respect of arbitration cases. I would guess it might be closer to 80%. But I put the bald, blunt proposition to you that more cases are won or lost by adequate or inadequate preparation, rather than in the presentation stage. For my own selfish reasons, I wish it were otherwise, because the presentation is the glamour end, but don't be mislead by that. These cases, I put it to you, are much more often won or lost in the preparation; so therefore regardless to what side you are on, you go into an arbitration hearing ill-prepared, that is your peril. If you haven't done your homework and you lose the case as a result, you have nobody to blame but yourself. In my own practise, I spent a fair amount of time, not just as council but actually arbitrating, sitting on boards of arbitration, and I have seen some absolute horror stories from both sides, of parties who hadn't done their homework, hadn't interviewed witnesses, hadn't done their preparation, and they go away and they lose the case and they say that dumb stupid arbitrator. Well, they are just kidding themselves; it's a copout. Because the arbitrator can only rule on the evidence and the information provided to him or her in the hearing and that's the job of the parties, and if they don't come forward with the necessary information upon which the arbitrator can make an intelligent decision, it's not the arbitrator's fault, it is the party's fault.

Alright, with that diatribe let me try and deal in practicalities. How do you prepare an arbitration case? What I have to say to you pertains regardless as to what side you are on. It's not that difficult assuming you do two things. One, you set aside the necessary time and secondly, you organize yourself and your material. The first thing you do is you gather together all of the documentation, all of the written information that has anything to do with that grievance--the grievance and the answers, minutes you may have taken as to what took place during the grievance meeting, any written information that may have been supplied to you on the other side. If you are on the employer's side--the personnel file, incident reports that may have been prepared, things of that nature. Now let me interrupt myself and address briefly those of you on the management side and say to you that you should be certain that in your plant, in your operations you have a system whereby your first-line supervisors are directed any time there is an incident, of any potential seriousness, that they prepare what is called an incident report, as a matter of regular course and routine. That is particularly crucial as in the film that you saw, if there is an incident that may potentially bring about discipline. What the manager should of done at the very least is to say to the foreman, "Sit down right now and write out for me a verbatim report of what happened." Two reasons for that; firstly, there is a time-lag, frequently many months between the incident itself and the actual arbitration hearing. It is very difficult for people to remember all the details. Now is the time to get on paper the specifics of what happened. Secondly, it is remarkable how people's memory is jogged if they are required to put something on paper. They are awfully glib when you ask them for an oral report but if you say, put it in written form, you are going to get, I suggest, a much more accurate account. This simple fact of having to concentrate and formulate words to put on paper, it would appear has the capacity to concentrate the mind much more directly on the problem. So, get that documentation and get it early.

Now, back to our general subject. You get that information and then you go through it. Two things to remember; one, you can't prepare an arbitration case by committee; somebody has to have the overall responsibility for doing it. Secondly, you may have a number of preconceived ideas about that case because you've been involved in the grievance meeting, you may actually been involved in the investigation. Well, try and wipe all of that out of your mind; try and start at the beginning; try and say, I don't know what happened, I am going to start with a clean mind. That is easier said then done, but try and do it anyway. As a corollary to that, read all this information, not just the part you like, but all of it and remember at all times to try and be as objective as you can. Because now you are preparing for an arbitration case and it is important that you understand, not only the strengths of your case, but the weaknesses as well.

Alright, you've read the documentation, now conceptually you have got a pretty good idea of what happened. Well, that is just the starting point, because the next stage is very important. You have to turn your mind to how you are going to prove the facts. Remember that the arbitrator doesn't know what happened, so it is your task to inform the arbitrator of the facts, but the law is clear that you can't do that simply by making a recitation of those facts, you have to bring out those facts and that information through the mouth of a real live witness. Therefore, you have to say to yourself, "What witness do I require to prove what facts?" Generally you cannot provide, for example, affidavits or statutory declarations to an arbitrator; you have to have the person there who can testify, here's what happened. The reason for this is that, that evidence has to be tested and the way in which our entire legal system operates is that it is tested through cross examination. More importantly, generally speaking hearsay evidence, that is evidence as to what somebody told you happened, is not admissable; you have to call the person who was physically there. So to explain myself in this case, if you were acting for the employer, obviously you have to call as a witness the foreman. You may also wish to call observers, that is people who were on the line who saw what happened to give their version of what happened. So you take this documentation, turn your mind to the potential witnesses that you may need and don't at this point form any judgement yet.

Then you begin the next phase which is to interview each of those potential witnesses. I don't know where this began but there is a misunderstanding in the minds of a great many people that there is something wrong, there is something improper with interviewing a witness to an arbitration case before that witness gives evidence. Well, that is absolute nonsense. It is not only wrong, I suggest you are under an obligation and an important one to interview a witness before you decide to call that witness in an arbitration hearing.

The simple fact is that if you call a witness and he gives evidence that is adverse to you, that is, that is against your interest, you are stuck, you are bound by that evidence. The only way you can decide whether to call somebody as a witness is you interview them. You cannot, should not interview a witness by committee; it should in my view be a one on one interview. It should not be on the line; it should be in somebody's private office and the interview itself has a number of purposes. The first is to ascertain to find out what the potential witness knows about the facts and the events. What I do if I am interviewing a potential witness is I begin with saying to the person, "Tell me everything you know about what happened." I don't interrupt the person, let him free flow, let him tell me in his own words everything that happened. I want to know the good and the bad, but more importantly at this point I want him to tell me his recollection. So the first part of the interview is to find out what the witness knows and the second part is to go back over those facts and to question and probe the witness. Now you should be taking notes of what the witness is telling you and you should take whatever time is necessary. This may take fifteen minutes, or it may take three hours.

Then the third stage is you go back over the facts again and you conduct quite literally a mini cross-examination. Now what you are doing here is you are trying to ensure that you know everything that witness knows about what happened, but you also are trying to form some judgements as to what kind of a witness that person is going to make. Is the person evasive? Is the person naturally a gabber; is it apparent that the person is just going to run off at the mouth? Is the person the kind of individual who can't recall specifics and details of anything. There are lots of people like that. These are important objective judgements you have to make.

Finally at the end of the interview, I usually say to the potential witness, I want you to go away and I want you to write down everything you've told me. That does not endear me to that witness but I am not there to win a popularity contest; my purpose is to be sure I've got all of the facts. Now notwithstanding my efforts I am frequently taken by surprise in arbitration hearings because the witness doesn't tell me certain things and you are going to be even more surprised if you are not too experienced, and that is just the way the world works. I don't mean to say that most potential witnesses lie; they don't do that, but most people have what I will euphemistically call a selective memory. They remember what they want to remember and what favourably reflects on them. They don't really want to tell you about the goof up that they made; they are no different from you or me. Why should you be surprised if they are reluctant to tell you this, and that is the purpose of the interview. You push and you probe in order to try and find everything you can about the strengths and weaknesses of your own case generally and what that witness knows specifically.

In case you think I exaggerate, I remember a labour board case I had where the allegation was that a manager of a small manufacturing plant in Hawkesbury, Ontario, that made a number of statements to a female employee as to what would happen if the union got certified as the bargaining agent, specifically that the plant would be closed, everybody would be fired, western civilization would end, all sorts of things like that. Well the union filed charges, gave the details and particulars of what he allededly said and the case was put on for hearing in Ottawa. I interviewed the plant manager; he denied saying everything. As far as he was concerned all this was untrue. I really didn't believe him because I have a cynical turn of mind I suppose and I've been burned too often. So the night before the hearing in Ottawa, I took him into my hotel room, sat him down and said, "Look, if you want me to adequately represent you, I've got to know all the facts, and I am sorry to tell you this but I don't really believe your story. Now tell me what really happened." Finally he had admitted, "Well yea, I guess I did say those things." But the problem was he had said them in bed with this young lady. Now that was a problem because both were married to different people and now he had a problem and I had a problem. In the morning when the case began, the young lady was called as the first union witness and she gave evidence as to what was said but I noticed, with interest, that she said nothing about the specific circumstances. So I waited until the examining chief was completed; I asked for a brief adjournment, talked to the council for the other side and said to him, "Do you know the circumstances in which these statements were made?" "Well, no." Well, I told him. He looked at me and said, "You bastard, you wouldn't," and I piously said, "Well, I owe it to my client; I've got to cross examine her about all of this; I've got to answer all of those questions." He had sort of forgotten that not only did I have a problem and my client have a problem, but so did his client. But to make a long story short, once he cooled down, we agreed that it was in everybody's interest that this matter be settled and we did so and went back in and informed the board that the complaint had been withdrawn and the matter was resolved. There was a situation where both people were knowledgeable, experienced, and neither client had levelled with the other.

So notwithstanding what I've said to you, you are going to get burned but do everything you can to avoid it. Interview all of your witnesses. Interview them in the same way I've described, then sit down and again don't do this by committee, and do two things. First of all, objectively decide what witnesses you are going to call now that you've interviewed them, and that is the order in which you do it; interview first, then decide. Remember please that too many parties call too many witnesses in too many arbitration cases. It is quality that counts, not quantity. If you've got five witnesses who can testify as to what happened, ask yourself whether you really need all of the five. You probably only need two, three at the most, not only because you clutter up the hearing with a lot of unnecessary information, but the reality is that it is likely that one or more of your witnesses will contradict what somebody else has said. But all you've done is complicate your own case. After you've decided what witnesses you are going to call, then sit down--I'm quite serious about this--write out, what one of my colleagues calls Sanderson's handy-dandy check list, and that is a bit of an unfair comment but it's not a bad description. What I do is I take the witnesses name and put it at the top of a piece of paper and I write down each factual point that I want to cover with that witness. I don't mean that I write out in detail all the evidence that the witness is going to give, I simply write down each factual point that I want to bring out through my examination of that witness. That has two major advantages. It forces me to organize my case because now I'm doing what I've required others to do, that is I'm putting down on paper certain ideas. Secondly, at the hearing it is invaluable, if you are inexpereinced you are likely to overlook things, the adrenaline is running, you are excited, you forget to ask certain questions on certain matters. You've got your checklist in front of you and you literally tick off each evidentary point as the evidence unfolds and at the end of it you should have all yours points ticked off, and if you've done a proper job of organization and preparation, then you completed what you wanted to complete through that witness. Remember once more that the arbitrator rules on the evidence put in front of him, and if you neglect to call certain important pieces of information, that is your failure. The way to avoid that generally is through careful preparation and careful organization. Now that completes what I want to say on that subject.

Now for a brief moment I just want to change course and suggest that there are some situations in which you may want to consider presenting information other than through the mouth of a witness. And what I mean to say is that there are cases where you may want to present an object, a photograph, a graph, something of that nature. So in the arbitration film that you seen, sure you can have a witness describe this long, sharp knife, but isn't it a lot more effective to have the actual knife there and to actually hand it over to the arbitrator, and say to him, "Here is the knife, Mr. Arbitrator." Quite seriously, that has much more impact and wallop then somebody saying, "Well, it was long and sharp and it looked rather dangerous." Watch whether the arbitrator crosses his legs or otherwise. There is occasionally a risk in this.

I remember a case in which an employee was accused of drinking on the job and the employer had searched his locker and they found a half empty or half full bottle of scotch depending upon your definition of an optimist. At the hearing the employer presented his bottle of scotch and said, "Well, this is what we found in his locker room." I happen to be on this board and again my friend, Earl Palmer, was Chairman. And Earl is a lot of things but one of his great strengths is he is very bright and he looked at the bottle and he said, "It looks like a bottle of scotch, and it says its a bottle of scotch," but he said rhetorically, "How can I decide the factual content of this bottle otherwise then by taking a drink." Well, that made some sense, I guess; so he took the top off and took a drink and announced pontifically, "It's scotch." Well, I thought all right; so I said to Earl, "I'm a member of this board and it is my obligation to make my own independent judgement of the facts. And with great respect, Mr. Chairman, I'm not prepared to accept your opinion without my own judgement," and Earl looked at me and said, "You are quite right, Mr. Sanderson." So I had a drink and the union nominee climbed on the band wagon and rather shortly the evidence was consumed. So as I say there are occasions when this is a problem.

Photographs can be very useful because they can depict an actual vision of something in a way that's very difficult to put into verbal tones or a blueprint. So there are ways and means whereby the evidence can be more graphically and dramatically presented. Again, I don't want to get technical with you but you might remember usefully that under your statute, arbitrators are free to receive into evidence, evidence that is not admissable in a court of law; so just because you can't present certain things in court, that does not mean you cannot present that evidence in that form in an arbitration setting. My point to you simply put is that arbitrations is an area, is a field where some ingenuity, some inventiveness can be very effective. It is less formal, it is less structured and therefore from your point of view in preparing your case, it is well worth taking a few minutes to say, how else can I present these facts other than just through the mouth of a witness.

Alright, one final observation in terms of the factual part of your preparation. I've been talking so far about a situation where the facts are going to be in dispute, but of course there are cases where some perhaps all of the facts are not in dispute; what is in dispute is the proper interpretation of the collective agreement in relation to those facts. So there is no argument, in other words, that the employees were not paid their vacation pay. The question is, should they have been paid bearing in mind the wording of the agreement. Well in that case, what you probably should be doing is having some consultation with the other side to see if you can reach agreement on the facts and that of course is easily done assuming the parties are of the same mind on the facts. I've got two suggestions to make to you. Don't leave that until the last moment. If you think you can reach agreement with the other party on the facts, don't wait until the day of the hearing. Secondly, be very careful to ensure that in the agreed statement of fact are all of the facts in which you must rely. Otherwise, you could find yourself in a position where you agree on the facts, you get to argument, the other side says, "But there are not facts on that point," and you say, "Well, I could call a witness," and the arbitrator says, "No, no, it is too late; you've agreed on the facts and now I'm not going to allow you to call additional evidence." So be sure you know what you are doing. Let me take a few minutes with you on the preparation of your argument.

Now I repeat once more my central thesis which is, you ignore your preparation at your peril. Similiarly, and perhaps even more importantly, you ignore the preparation of your argument at your peril. Let me personalize this. As some of you realize, I have not a note in front of me, but I prepared this thought and I did so in advance. So it's a question of the organization and structure you give to your case. How do you do it? It's not that difficult; again assuming you follow the two approaches I suggested--you take the time that is necessary and you organize. By this time in your preparation, you know what the facts are. So what you do is you take the collective agreement and you read through the collective agreement in respect of the particular issue that's involved in your case. Please, and I beg you and I'm serious about this, read the entire collective agreement on that point. Time and time again inexperienced people read part of the agreement; they find a clause that they like and they stop. They don't go on to read the next clause that qualifies that clause or perhaps in part contradicts it. So read through the agreement in respect of that matter, then you go to the jurisprudence. There are in canadian arbitration law to major and important textbooks that I draw to your attention, and then I'll explain my point in a moment. The first is "Brown and Beatty," that's a text written by David Beatty, who you will be seeing shortly in this tape; and Don Brown, he's a practising lawyer in Toronto. They had the horrific job of taking all of the reported labour arbitration cases going back to 1946 and they quite literally closeted themselves in a farmhouse near Toronto and for thirty days and nights, and they tell it much more dramatically then I do, they read and studied and analyzed these cases and made notes on it. Now that is a mind-boggling task, and they did a tremendous job. They compiled then a textbook. A word of caution, all that "Brown and Beatty" does is it recites what the author thinks the arbitrators says in the cases, but it leads you to all the case law and all the citation of cases on that particular point. The second text is by Earl Palmer, called, "Labour

Arbitration in Canada," and that particular text picks up where Brown and Beatty leaves off and what Earl has done is he has not only traced some of the developments in law but he's editoralized. He gives you some ideas and some perceptions as to where the law is going.

Now arbitrators are not bound by the decisions of other arbitrators. In the legal jargon the rule of precedent does not apply. It is unlike the courts and that is exactly and precisely why in many areas you find different arbitrators going in totally different directions on precisely the same issue. Now while that is frustrating in the sense that you can, as I told you earlier, find cases of virtually any proposition you want to advance. I think in the long run it is very good and very healthy because arbitrators should reflect different attitudes, different social values, different trends as they work through the labour management system. If arbitrators were bound by what other arbitrators had said in the past, then the arbitration law would be literally frozen. It is not the case, and as I say to you I think that is probably a good thing. Years ago, for example, there was a principle that if an employee was caught as a result of theft, discharge was the only proper punishment and for a large number of years arbitrators followed that rule. In 1973, Ted Weatherill in the Ford case said, "No, I disagree with that," and as a result of that decision, a number of arbitrators agree with Weatherill. Others still don't go in that direction and follow the older cases. Apart from the text where else can you look for any guidance. Well, again in Canada, we only have one series, "The Labour Arbitration Cases," and if you do any work in this field of any substance you probably should subscribe to it. Again a word of caution, while the LAC's report cases from right across Canada, they'll only report a small number of cases. It is simply physically impossible to report them all and therefore there is a lot of editorial judgement that goes into what cases are to be reported and what are not to be reported, but at least you can find the major cases. By major, I mean the important cases of principle that deal with the given subject. In addition, if you read the LAC's regularly apart from the role in any arbitration proceedings, I suggest you are going to be a more effective manager of labour relations. Again, depending, it doesn't matter whether or not you are on the union or management side, because you will be aware of the trends in arbitration, you will be aware of what arbitrators are saying and doing in given situations. That will necessarily help you in making your decisions in your capacity as an advisor.

Then there are what are called the unreported cases and I understand from some of you people on the Island that there is no current requirement in the legislation that arbitrators must file with the ministry of government in these cases. So, you've got no direct access although I persume if you are involved in cases yourself, that you've kept copies of those cases, and if you don't, you probably should have. There is one final reference area often overlooked but I think it is worth giving some thought to and that is the American jurisprudence. It again is startling to me how narrow we often are in this country in terms of labour-management problems, and how we forget that in the U.S. many of precisely the same problems that we are now facing have been faced in their jurisprudence and there are a lot of very capable and very intelligent arbitrators grappling with precisely the same issues that our arbitrators are dealing with. There are a wealth of ideas and concepts and viewpoints that can be used. Where arbitrators in the U.S. have as it were blazed a trail and parties can usefully profit from that. Let me try and give you just one very brief example.

This involved a hospital. An employee in a hospital who a number of years ago was given a criminal conviction for arson and when he was hired by this particular hospital in London, Ontario, he didn't say anything about his criminal conviction and he had worked there for some eight years and he had an absolutely spotless record as an employee. But it transpired that the fact that the criminal conviction became known to the hospital Director of Personnel who talked to some psycharists in the hospital, and they told him look, sorry about this, the repeat rate for arson is very high. There is a significant risk psychologically that this person will commit arson again and there is a significant risk that it will be here in the hospital and most of the patients are ambulatory and a tragedy could easily result; so the hospital fired him. In due course, the matter came out in front of an arbitrator and the union understandably argued, "Look, he's got an absolutely spotless record. You can't lay a glove on him," and the hospital said, "Wait a minute, there is an American theory developed over a number of years called the theory of the unacceptable risk, and that is what the arbitrator has to balance the individual social responsibility to the individual grievor. First, it is the arbitrator's responsibility to the patients in that hospital and he has to conclude as to whether the individual's interests outweigh the interests of the patients, and that depends upon the evaluation of the risk inheriting the situation." Ultimately, the arbitrator concluded that the hospital was quite right, and upheld the discharge of the grievor. My point is not to say whether that decision is right or wrong, but to simply say that there is a situation where a canadian arbitrator was persuaded as a result of carefully thought out and developed arbitration thinking as it worked its way through the American system. So in some situations, to your own profit, you could spend a little time examining the American jurisprudence as well.

Alright, you've looked at the agreement; you've looked at the cases; that is the first step. Now what you have to do I suggest is to sit down and decide in precise terms what your argument is going to be. If you wish you can write out your complete argument. The risk of that is that the case may unfold somewhat differently than what you anticipated. The evidence may take its different twists and turns and that may impact upon the argument; so I think the better approach is to write out your argument yes but do so in only point form. Alright, so you decided generally what your arguments are going to be. May I remind you that there is nothing to proclude you from arguing in the alternative. You are not obliged to put forward only one argument; indeed in many cases it may be highly appropriate that you develop two or three arguments. That is the employer might argue well discharge was warranted, this is in the case that you have seen; the employer may go on to argue in the alternative if you agree with discharge. You certainly have to impose a heavy penalty. The problem with that is tactically that by making the second argument you invariably weaken the first and therefore you have to make a decision and the time for making the decision is in the preparation not in the actual hearing as to whether tactically you want to make the alternative argument. I realize that I am being repetitive but I don't apologize for that; the time for making these value judgements, the time for turning your mind to these tactical issues is in the preparation stage. You haven't time to properly make that judgement at the hearing, and that is particulary true if you are not experienced. So make your decision then.

Alright, you've got one final task in the preparation. This may seem strange but I stand by it; you prepared your case, now spend a little time preparing the other side's case. Let me put it to you that you've got to make the assumption that the other side will be just as well prepared and organized as you are. If you are lucky, that is not the case, but don't count on it. If you go into an arbitration hearing and the other side comes up with some brand new argument that you never thought of by in large, you have not done a proper job of preparation. You should have anticipated what the other side is going to say; so that when they say it and the arbitrator looks at you and says, "O.K., what have you got to say about that?"--You have something constructive that you can say. There is nothing worse, there is no more lonely feeling then to have completed your argument and the other party comes up with some ingenious twist. The arbitrator says, "What do you say about that?" And you say, "Yea, what do I say about that?" So think a bit about what the other side is going to say; put yourself in the shoes of the other side and say, "Alright, if I were he, what would I argue?" Then, of course, give some thought as to what your response is going to be. O.K. that effectively ends what I wanted to say to you about the preparation stage. Don't be mislead by the fact I have only spent a short time with you on that subject, because it is crucial in this whole scheme of things.

Let me now turn to the third part of this program which is the hearing itself. Let me begin with a statement that some of you may say, it is strange coming from this source, and that is you don't need to be a lawyer to be an effective representative or presenter of arbitration cases. In fact some of the more effective advocates that I know of on both sides are not lawyers. He gets infuriated when I say this, but one of the most effective advocates that I've faced is Dennis McDermitt. If I want to get Dennis upset, I say to him, "You know, you are as good as any lawyer that I have faced." He regards that as the ultimate insult, which is with my sense of humor is why I say it to him. That is all right, we've crossed swords before and will again. But Dennis when he was active in the arbitration field, was most effective. Similarily I know of management persons who are very skilled and very effective advocates and who present regularly their own arbitration cases. Now being a lawyer helps because you hopefully have some understanding of the legal, technical aspects, but I will go further with you, perhaps with some disrespect, and say probably the worst advocate you could have is a lawyer who is not experienced in labour-management matters generally or arbitrations in particular. Because that kind of person invariably will adopt courtroom tactics and approaches that are fine in that arena but not appropriate in the arbitration setting. I am going to make the assumption if I may that each of you has the task of putting forward an arbitration case. You are presenting a case. I want to tell you what is going to happen in the hearing.

The role model that I present to you is the model followed by arbitrators right across Canada and it's a model that is based upon fundamental principles of providing a fair hearing to the parties. It's been worked out by many arbitrators over an extended period of time. At the beginning of the hearing the parties file appearances, that is they give the arbitrator a list of the names, the participants, and the spokesmen and the addresses so the arbitrator knows where to send the award and from his point of view, his fee. Then the arbitrator normally goes through a couple of procedural matters and he asks two questions: 1) Do the parties wish witnesses to be sworn, and 2) Do the parties wish witnesses to be excluded? My suggestion to the first question is, yes; you should always ask the witnesses to be sworn. Not because it's going to guarantee anything but because it's going to provide a more solemn and a more serious atmosphere and I think that's good. As to exclusion of witnesses, that covers a situation where it's going to be a conflict of evidence and you don't want witness "A" giving evidence in the presence of witness "B" who is going to be the next witness because invariably witness "B" is going to listen and tailor his/her evidence to coincide with what witness "A" said. That is a normal human reaction. So in that situation the general practise is witness "B" is excluded until witness "A" has completed his/her evidence and then witness "B" is called in.

So in short, the only time when witnesses are excluded, is where the evidence is going to be in conflict. Alright, when those procedural matters are dealt with, normally what happens next is that the grievance is filed along with the collective agreement and the formal grievance answers. They go in as a matter of course, sometimes identified as exhibits, sometimes not; it doesn't really matter. The arbitrator receives them.

Next stage the arbitrator says, are there any matters of jurisdiction? Now what the arbitrator is saying to you and the other side at that point is, is there any issue as to whether or not the board is properly constituted; is there any issue as to whether I have jurisdiction to hear the subject matter of the grievance. For example, the parking lot case I gave you earlier, or an argument that the grievance is untimely. The agreement says you have to file a grievance within five days; the grievance was filed after thirty days, therefore the argument is its untimely, therefore the arbitrator hasn't got jurisdiction; that kind of issue. Probably ten to fifteen percent of the cases, if that, have that kind of a technical objection going to jurisdiction. If there is an issue, the arbitrator hears the submissions of the parties, makes a ruling, and then the case proceeds. If not, it's academic and you go directly into the merits of the case. Those are the opening matters.

Now we come to the meat of the hearing. First thing that is done is that the parties make an opening address, an opening statement. I want to go back over those matters with you later. You don't have to, you are not obliged to but generally they should, and briefly describe each of them from their own point of view, what the case is all about. Then there follows what is known as the evidentiary part of the hearing and that is the stage in which the witnesses are called and heard. There is a simple rule to follow here--if it is a discharge or discipline case the employer proceeds first to call evidence. It doesn't matter whether the employer wants to; that is the requirement. If it's any other kind of a case, if it's an interpretation issue, a seniority case, whatever, the union proceeds first to call its evidence. Each witness called goes through three stages: examination in chief, cross examination, and redirect examination. The side that bears the onus in discharge or discipline, the employer, in any other case, the union, has to call all of its witnesses. It then closes its case; that is, it says those are all the witnesses I propose to call. The other side then has the right to call its evidence. It's not obliged to; it may elect not to, but it has that right. Each of that parties witnesses go through exactly the same three stages that I have outlined; direct cross examination, redirect. That party calls all the evidence it wishes, then the party that called evidence first has the right to call evidence in reply but only in respect of new and different matters that arose out of the other side's case. I've probably lost you; don't worry about it; we'll come back to it. That ends the evidentiary part of the hearing. So you've got these three stages; the party that bears the onus in the case you are going to see is the employer. It has to go first, calls its evidence, closes its case; the union calls its evidence and the employer can elect to call any reply evidence but only in respect of new matters brought out by the union when it calls its case.

Then there follows the argument stage of the hearing, literally and methaphorically, and that's the stage at which the parties make their legal submissions and representations. Arbitrators hear the facts. Now the question is what should the arbitrator do about those facts in relation to the agreement. The side that called evidence first argues first; the other side then argues and the side that argues first has the final right of reply. So the order of calling evidence and the order of arguing is precisely the same, and again it has three stages. In the film the employer has to argue first, the union responds, the company then replies. That ends the hearing as far as the parties are concerned. Then you have the decision making process; the arbitrator goes away and makes a decision. He then issues a decision in writing; you receive the award. I find it impossible to believe, but in the unhappy event, notwithstanding what we've talked about, you've lost the case, you then only have one recourse and that is court in the event of an error of law. But generally speaking the award ends the matter and you have to abide by it. Now perhaps all too briefly I've sketched for you an overview of the case.

In a minute you are going to see the next tape. A couple of words of disclaimer. The tape you are going to see shows the evidentiary part of the hearing, it doesn't show the argument stage, but it gives you I think a real feel for examination in chief, cross examination, and what really takes place in an arbitration hearing. The disclaimer is that it is misleading. First of all it's time-shortened, that is the participants only had a short space of time. In a real hearing they can cross examine for as long is relevant. In the film, participants were given twelve minutes or whatever was the time period. Secondly, and interestingly, it was done totally without a script and there were no retakes. Now of course in the real case that wouldn't happen; everybody would know what was going to be asked as a question and what the answers would be. The purpose of doing it that way was to make it as spontaneous as possible, and I think that comes through but at the same time that's not the way really to conduct a case, but the corollory is as a result it is as close to the real thing as if you were there. Now, you'll have to take it on faith, but I was involved both in the film itself and the real case and I can assure you that what you see on tape is just about dead on with what actually happened in the case. Thirdly, I want you to remember what I told you about the importance of making value judgements. I told you one of the value judgements you make is what evidence you are going to call. In the interview stage and there is a tape on this, because of time I wasn't able to show you, council for the union was advised by the grievor -- "Yeah, I intended to cut him, if he had moved I would of taken that knife and I would of hurt him, because I hated the bastard." That's what she told him. Now, he made a tactical decision that there was no way he was going to call that witness. He wouldn't dare, because that would blow his case and her case right out of the water. But here we get into the gamesmanship; he certainly wasn't going to tell anyone else about that decision. So as you will see the grievor was not called as a witness, and that was deliberate and conscious and correct in the result a decision that was made. Finally, I want you to reflect on the fact that the facts as recited by the witnesses is somewhat at variance to put it charitably with the facts in the first tape that you have already seen. And of course that is the way it happens. The arbitrator isn't able to go back and view a tape in order to find out what happened. The arbitrator learns what happened because the witnesses tell him what happened, but their memories are shaky, their perceptions differ, their memory is selective, and therefore he gets a version of the facts that is somewhat filtered, again to put the matter mildly. One can say that is unfortunate and in the abstract that is true, but that is the way it is, and that's the way we have to deal with this process.

One other thing I neglected to tell you, this is a teaching film and the two council, Jeffrey Sack and myself were asked by David Beatty to build in some technical subjects, build in some objections, make some mistakes as council; so both Jeffrey and I knew exactly what we were doing, but I think it will give you an idea of the kinds of issues, the technical objections that sometimes arise. The other part is that even though we were play acting in the sense, that this is a film as you'll see the objections are taken with some force and some vigor and that I think tells you something about the gamesmanship that pervades this process that is just part of the stuff of arbitration law.

PRESENTATION OF FILM

Chairman (C) - "Well gentlemen, if we could just come to order, then firstly I would like to just dispense with any preliminary matters that there are. Can I take it from both of you that the steps of the grievance procedure have been properly exhausted, that the board is properly constituted and that we have jurisdiction to hear this case, is that ..."

Mr. Sack (Sk) & Mr. Sanderson (Sd) - "Yes, Mr. Chairman, it is."

C - "Thank you, one other just preliminary matter; it usually is my practise to defer to the parties on exclusion of witnesses and swearing of witnesses. Do you have any ideas on that--Would you prefer to have them excluded?"

Sk - "In the circumstances of this case, it would be my submission that the witnesses should be excluded and I would also ask that they be sworn."

Sd - "And I agree with that, Mr. Chairman."

C - "Thank you. Do either of you have advisors that you will be keeping with you; you'll obviously want to keep the grievor, Mr. Sack."

Sk - "Well, the customary practise, Mr. Chairman, is for the grievor to remain throughout the proceedings and for each party to have an advisor who will probably not be giving evidence. The grievor, I intend to retain throughout the proceedings and Mr. FitzPatrick, the union representative, will also remain, apart from that I have some other witnesses who I would ask to leave the room. Mrs. McQueen, would you like to leave the room. Please remain outside until you are called. Mr. Chairman, I'll be keeping the plant manager with me, I don't know whether I intend to call on this witness, but I propose to keep him as my advisor. The gentlemen sitting to my right is Mr. Mason; I intend to call as my first witness, so perhaps he can remain for the moment."

C - "Fine, thank you. Perhaps we could proceed then, Mr. Sack."

Sk - "Mr. Chairman, perhaps I should say at the outset that I'm appearing as council for the United Insulation Workers, Local 516, and I have with me, Mr. FitzPatrick, the representative of that union, and the grievor, Mrs. Edna Beckers. Mr. Sanderson is acting for the company and he will no doubt introduce the witnesses and parties who are tending with him. This is a grievance involving the discharge of one, Edna Beckers, on May 24th of this year and it is the unions submission and the issue in this case, the discharge was without just cause. Now I have copies of the grievance for the board and I would like to file copies of that grievance. Should we mark this as exhibit one?"

C - "If you wish; the grievance will be exhibit one."

Sk - "You will note, Mr. Chairman, from the grievance that the grievor has grieved that she has been discharged without just cause, contrary to the terms of the collective agreement and claims that she should be reinstated with compensation of wages and other benefits lost as a result. Now the company replied to that grievance and you will find the reply on the back of the grievance form that a violation of the collective agreement is denied, and the action of the company is sustained. I have also for you, Mr. Chairman, members of the board, copies of the collective agreement itself which I would also file with the board."

C - "Thank you."

Sk - "And perhaps they should be marked as exhibit 2."

C - "Fine, we'll mark the collective agreement as exhibit 2."

Sk - "And you will note, Mr. Chairman, that the agreement contains a clause article 8, which provides that no employee shall be disciplined or discharged without just cause, and it is that provision of the agreement which we alleged has been breached by the company. Now for the rest, Mr. Chairman, I might say only this in introduction, Edna Beckers was employed with Stormfill Limited for seven years as a packer on the polystyrene line; she was discharged on May 24th, allegedly as a result of an incident that took place on that day. The union claims that, that discharge is unjustified. Now in ordinary grievance cases the onus is upon the union to establish its case but in discipline and discharge cases, because the reasons for discharge are primarily within the knowledge of the employer, the onus is upon the employer to prove its case, to prove that there was just cause for the discharge. Accordingly, I would submit the company should call its witnesses first. I would, however, suggest to the board that the matter of compensation not be inquired into at ~~this~~ stage but that if liability is found by the board, i.e., if the board finds that the grievor was discharged without just cause, tha the parties be directed to determine how much in wages the grievor lost and if they are unable to come to an agreement that the board be remained seized with jurisdiction to determine that issue."

C - "Thank you, Mr. Sack. Mr. Sanderson."

Sd - "Thank you, Mr. Chairman. Mr. Chairman, members of the board, by way of opening statement, I may be able to expedite matters somewhat. First of all, without any argument on the matter we are prepared to accept the burden of calling evidence first. I think that is quite proper in so far as the authorities are concerned in a discharge case. Having said that, I'm also prepared on behalf of my client to agree with the suggestion of Mr. Sack, that we leave aside the issue of compensation, the subject, of course, as my friend has noted to the board, remaining seized of that matter in the event the parties can't agree. I can also perhaps assist the board by admitting on behalf of the company that the grievor, Mrs. Beckers, was at the material date an employee of the company, that she was in fact employed in the capacity of packer in the plant and that she did have a seniority date of seven years. I can go further and advise the board that the position of the company is that she was discharged for certain events that took place on Friday, May 24th, and that nothing turns upon her past record as an employee. The company did not rely on any prior disciplinary offences but acted solely as a result of what transpired on that day, May 24th. Now insofar as what happened on that day is concerned, let me briefly characterize the evidence that the board will hear and state that she, the grievor, was discharged because of an assault that took place on a member of supervision, in addition, certain grossly vulgar words and statements were made by her to a member of supervision;

and finally ..." Did you change her job yourself or did you ask somebody else to do that?"

Mr. Mason (M) - "No, I took it upon myself after some thought to change her job because of her appointment as a union stewart, which might mean that she might be away from her area for a time so I have to train somebody else for the job."

Sd - "So you were concerned with having a back up to her job, is that correct?"

M - "Yes sir, that was the main idea?"

Sd _ "Alright, what happened after this transfer had taken place; when did you next come in contact with her?"

M - "Well, right afterwards, she came up to me shouting my name and obscenities through the factory and asked me what was going on and I told her she was just being changed and that she would have to come in a bit earlier."

Sk - "Mr. Chairman, could I ask that the witness be cautioned to slow down a little because this evidence is being transcribed in long hand by all of us here and there is as customary no shorthand reporter present."

C - "Yes, I quite agree with Mr. Sack; perhaps Mr. Mason you could try and slow down your evidence somewhat."

M - "Alright, sir. Let's start with my day and I'll run through it."

Sd - "Fine."

M - "I arrived at the plant about seven o'clock and I checked the packing area and the trimming area to make sure that tools were there, to make sure that the machines were in working operating condition, and waited for Mrs. Beckers, Mrs. McQueen and some of the other employees to arrive and punch in. When Mrs. McQueen arrived I asked her to come to my office and I explained to her that I wanted to change the packing line, that I wanted Mrs. Beckers to leave the packing line and put someone else in that position, because as I said I wanted a backup person because Mrs. Beckers was appointed union stewart."

Sd - "Was she on the union bargaining committee?"

M - "Yes sir."

Sd - "And as such, would you have anticipated that she would be away from the plant from time to time?"

M - "I most definitely did sir, but not only that I was afraid of illness so I had to have a backup person in that position."

Sd - "Did you have any anticipation that she, Mrs. Beckers, would be objecting to a transfer?"

M - "No sir, I had no idea."

Sd - "Now Mrs. McQueen, I presume talked to Mrs. Beckers about the transfer, you didn't?"

M - "Yes, Mrs. McQueen did."

Sd - "When did you next have any discusssion with Mrs. Beckers?"

M - "Oh, I would say about seven thirty."

Sd - "Right."

M - "Mrs. Beckers as I said started screaming my name across the factory, across the plant and yelling something about me being God, and I couldn't understand most of it because it was in Dutch. When we finally did get in range of each other, she asked me why I changed her, and that I had no right to change her; she mumbled something about losing ten cents an hour."

Sd - "Go slowly, the board has to take this down."

M - "She mentioned something about losing ten cents an hour and having to come in later and feeding her children and at one point she grabbed one of the knives from the packing area."

Sd - "Before we get to that, you told me a few moments ago that she was shouting obscenities, perhaps you could tell the board what those obscenities were, or did these obscenities take place later on?"

M - "Well, these obscenities took place at the time she came up to me."

Sd - "What precisely did she say?"

M - "Well sir, I would be embarrassed to tell this hearing."

Sd - "I'm sorry, I don't want to see you embarrassed, but it is important that the actual words be noted on the record so that the board can hear in fact what was said."

M - "Well, I was called a bastard, she was going to cut off my balls with this packing knife that she had and again she made certain references to my state, my manhood, and well just in general the words were quite obscene, sir."

Sd - "Now I suggest to you that she was quite agitated, quite upset, and her manner and demeaner were that of a pretty wild person."

Sk - "I object to that, Mr. Chairman, that is a leading remark; it suggests the answer to be given and the evidence to be profered and is highly improper. Mr. Sanderson is an experienced council and knows very well that those remarks are not appropriate. I would ask that the question be withdrawn."

Sd - "Well, Mr. Chairman, I think Mr. Sack technically is correct; I was merely attempting to expedite the hearing by trying to save the Board and the witness some time but I'll withdraw the question; I'll take a little longer. Perhaps you could describe for the Board the demeanor of Mrs. Becker's at the time that she had the knife and that the time that she was shouting obscenities."

M - "I'd say she looked like a wild women, sir; she was screaming, waving her arms, waving this knife, she just threw herself wholeheartedly at me practically and because of her stature, I was actually quite afraid of her and upset."

Sd - "Would she touch you with the knife?"

M - "No sir, but she came close."

Sd - "And you were frightened by the possibility that she would of cut you?"

Sk - "I object again on that, Mr. Chairman, that also is in the inquest."

Sd - "The witness has already stated that he was frightened and perhaps I will ask the question in a different way. Why were you frightened?"

M - "I was frightened because it was a very sharp packing knife being waved at me by someone who was in a very emotional state and who was using the actual, not just the physically, but the words to threaten to cut off my balls."

Sd - "Now how long did this altercation take in terms of minutes?"

M - "Well, it seemed like forever to me at the time, but when I think back, I don't think it took any longer than five minutes to get her over to the trimming area."

Sd - "Alright, so if I understand your evidence of following the initial altercation, she went over to the trimming area and commenced to do her work in that area. Is that right?"

M - "She started to but she wrote out a complaint which she brought to me. She had a written complaint which she brought to me, which we discussed and she got quite agitated about that complaint."

Sd - "Was this a grievance?"

M - "Yes, it was a grievance slip."

Sd - "Yes, and what did you do with the grievance?"

M - "Well, I took it from her and I placed it on the table nearby."

Sd - "Alright, what happened then?"

M - "Well, she came after me with the scissors and threatened to cut off my ears."

Sd - "These were the scissors that she used on her trimming work?"

M - "That's right, sir."

Sd - "She threatened to cut off your ears?"

M - "Again, shouting obscenities, saying that I was a no good bastard, that I wasn't listening to what she had to say, and again in a very agitated state, waving the scissors around and actually threatening me."

Sd - "Were you frightened by this?"

M - "Yes sir, I was quite frightened again."

Sd - "And how long did that incident take, that is, that altercation?"

M - "About another five minutes or so, sir."

Sd - "Now, at the completion of that incident, I understand that you then reported the matter to your supervisor."

Sk - "I object to that, Mr. Chairman; that too is a leading question."

C - "Well, I don't think it is a matter of dispute Mr. Sack; this witness was not involved in the decision to fire the grievor."

Sk - "But that too is evidence and I object to Mr. Sanderson giving evidence."

Sd - "Alright. What happened following the incident?"

M - "Well the incident was actually closed by Mrs. McQueen coming up to me and telling me that the Manager, Mr. Fair, wanted to see me and he had arrived and I went to see Mr. Fair.

He noted that I was a bit upset and I explained to him what happened. He, in the meantime, called in some of the people who witnessed this incident. He called in Mrs. Beckers and he was the one who decided to dismiss her from the job."

Sd - "Yes, well that's a matter of record, the letter of termination was not signed by you, the letter of termination is on file with the Board. Mr. Chairman, those are all the questions that I have with this witness at this time."

C - "Thank you, Mr. Sanderson. Mr. Sack."

Sk - "Mr. Mason, you decided for some reason to remove Mrs. Beckers from the job that she had been doing in the packing and put her on the trimming line. Is that correct?"

M - "It wasn't just some reason, sir; it was quite a definite reason."

Sk - "Please answer my question, is that correct?"

M - "Yes sir, that's correct, for a definite reason I transferred her."

Sk - "I take it that the subject matter that is being packed and trimmed is polystyrene, is that correct?"

M - "That's right, sir."

Sk - "Was Mrs. Beckers good at her job of packing polystyrene?"

M - "She was sir, after seven years, yes."

Sk - "You concede that she was a good worker. She was no problem in any way on her job sir, she did her job. You had no complaints about her work?"

M - "Not, ah."

Sk - "According to you, you didn't have any complaints about her work?"

M - "No sir."

Sk - "Now when did you make the decision to remove her from the job which she had been doing for several years and put her on another line?"

M - "I started thinking about the decision when she was elected union steward. I made the final decision in my mind the morning of May 24th."

Sk - "Mrs. Beckers came in to work that morning at her usual hours--7:15?"

M - "Yes sir."

Sk - "At what time did you make that decision known to her?"

M - "I didn't make it known to her personally, I called in Mrs. McQueen to relay the message to her of the transfer. So I would say between 7:15 and 7:25."

Sk - "Why Mrs. McQueen? Is she a floor woman?"

M - "Ah, Mrs. McQueen is a supervisor in the plant, sir."

Sk - "So you didn't tell her personally?"

M - "No, I asked Mrs. McQueen to relay the message to her."

Sk - "Did you tell Mrs. McQueen why she was being relieved from one line to the other?"

M - "Yes sir."

Sk - "Did you take any steps to see that Mrs. Beckers was informed of the reason?"

M - "No sir."

Sk - "And if I put to you that Mrs. Beckers was not informed of the reason for being removed from her job, would you be in a position to deny that?"

M - "Yes sir, I think Mrs. McQueen would have informed her; she wouldn't have just pulled her off the line."

Sk - "But you don't know that for sure, do you; you're just speculating?"

M - "I don't know sir."

Sk - "Now you said yourself that you heard Mrs. Beckers complaining of certain matters; for example, that she was going to be losing 10 cents an hour. Is that correct, that she would be losing 10 cents an hour by being switched from one line to another?"

M - "Yes sir."

Sk - "And also that her starting time would be changed from 7:15 to 7:30. Is that correct?"

M - "That's correct sir."

Sk - "So that she would have her working hours changed and her wages reduced--that is correct?"

M - "Very slightly sir."

Sk - "Maybe slight to you Mr. Mason, but it may not be slight to somebody who doesn't earn as much as you do."

Sd - "Well perhaps you could ask questions, rather than make speeches."

Sk - "In any event the next thing that you know is that Mrs. Beckers was heard calling obscenities to you in the plant?"

M - "That's right sir."

Sk - "By the way, you stated in your evidence that you would ask Mrs. McQueen to tell her that she was being changed from one line to the other?"

M - "That's right, sir."

Sk - "However, you gave evidence earlier that you told her yourself?"

M - "I did not sir, at no time."

Sk - "Well, I would ask the Board to check its notes; but my recollection is that this witness initially said that he himself had served Mrs. Beckers."

M - "I spoke to Mrs. Beckers after Mrs. McQueen had told her."

Sk - "What did you speak to Mrs. Beckers about?"

M - "When she came up and asked me why she was being transferred, I just told her she was being transferred."

Sk - "And did you give her the reason?"

M - "I didn't get a chance to because she was being so foul-mouthed and threatening."

Sk - "Please answer my question, witness--Did you give her the reason?"

M - "I didn't get a chance to give her the reason."

Sk - "The fact remains Mr. Mason that you didn't give her the reason, did you?"

M - "I didn't get a chance to give it to her."

Sk - "You heard Mrs. Beckers say that she was losing money, that she would not be able to buy bread for her children, and you didn't even give her a reason. Is that correct?"

M - "Well, if she had kept quiet long enough, maybe I could of given her a reason."

Sk - "Well, there's no reason. Mr. Chairman, I would ask if you would direct the witness to answer my question."

C - "I think it's a fairly simple question Mr. Mason and I don't think there is any reason for any of us to, ah."

Sd - "Mr. Chairman, he's trying to."

Sk - "It's just a simple question."

C - "Mr. Mason, in fairness I think perhaps you could just answer the question."

M - "No I did not give her a reason at the time."

Sk - "Now Mrs. Beckers is Dutch, is that not correct?"

M - "Yes sir, I believe so."

Sk - "And she has difficulty speaking English; is that true?"

M - "Yes sir, I think it may be a lot more in her imagination to lead us believe that she has a language problem then there really is."

Sk - "Why do you think that, Mr. Mason?"

M - "Well, I think she has been here long enough that she could pick up enough language to understand and express herself."

Sk - "Mr. Mason you have alleged that Mrs. Beckers threatened you and shouted obscenities at you. I put to you that Mrs. Beckers has never done anything of this kind previously, has she?"

M - "Not as far as I know, no."

Sk - "She has never used language of this kind before; she has never acted in the manner that you have described before, has she?"

M - "Not at the plant."

Sk - "No, however, you are known on occasion to have used abrupt abusive language toward employees, isn't that correct?"

M - "No sir, that is not correct."

Sk - "Haven't there been complaints about your behavior by employees under your supervision?"

M - "Not as far as I know."

Sk - "I put to you, Mr. Mason, that that is a fact. Now remember that you are under oath. Are you telling this Board that you have no knowledge of any complaints made by employees about your behavior?"

M - "I have no knowledge of any complaints, sir."

Sk - "Now, you stated that following this initial altercation, Mrs. Beckers handed you a grievance. You stated that you placed it on the table. Isn't that correct?"

M - "That's right, sir."

Sk - "I put to you, Mr. Mason, that you crumpled up that grievance in your hand before placing it on the table. Isn't that correct?"

M - "I don't know, I might of."

Sk - "In front of the grievor, Mrs. Beckers."

M - "Well, I might of done that; I'm not too sure. All I know is that I did throw it on the table."

Sk - "If I put to you that you crumpled it up in front of her face, threw it down on the table; would you deny that?"

M - "I can't deny it, because I don't know right now. I put it on the table, I may of crumpled it up. You know, who knows, at the time I was looking at a woman who was being obscene towards me, who was threatening me."

Sk - "Were you angry?"

M - "No, not really. I was just scared."

Sk - "You were scared; that's your position, that you were scared. Is that correct?"

M - "Yes."

Sk - "Didn't you have your hands in your pockets at the time?"

M - "Yes."

Sk - "And where did you say she waved a knife about, close to you. Did you take your hands out of your pockets?"

M - "No, because even though I was afraid, I didn't think she was actually going to do anything with that knife."

Sk - "That's right, you didn't think she was going to do anything with that knife. You knew that she was in an excitable state."

M - "That's right and the whole idea was I didn't want to make any offensive moves towards her."

Sk - "Did you not walk away?"

M - "I backed up."

Sk - "You didn't walk away down the line toward the office, did you?"

M - "I tried to get her to calm down, and I tried to get her over to the trimming line."

Sk - "You stayed right there?"

M - "I tried to get her towards the trimming line."

Sk - "And when she did calm down, you then followed her to her work place, didn't you?"

M - "That's right."

Sk - "And when, as you say later, she picked up a pair of scissors; you didn't walk away, did you? You stood calmly by."

M - "I think outward appearances might have been calm but that was, I was hoping to keep her calm by appearing calm and not afraid."

Sk - "So you will admit that from outward appearances, you were calm?"

M - "I might of been, yes, but the main idea was that I didn't want to agitate her any more than she was. She had the knife at one point and the scissors at another. Who knows what could have happened"!

Sk - "Doesn't she work with a knife?"

M - "Yes, she does."

Sk - "Doesn't she work with scissors?"

M - "Yes, she does. She works with a knife at her packing table; she works with the scissors at a cherry table, which are down on tables, not staring me in the face or threatening me with them."

Sk - "Mr. Mason, Mrs. Beckers was waving her hands at you, isn't that correct?"

M - "And in those hands were a knife at one point and a pair of scissors at another. Very sharp instruments which could do a lot of damage."

Sk - "But I could say to you, if she did have those instruments in her hands that was simply because she happened to be working with those at the time and they were in her hands?"

M - "No"

Sk - "Did she touch you; did she injure you in any way?"

M - "Not physically."

Sk - "If I put to you that she was waving her hands and had no intent to injure you, can you with certainty deny that?"

Sd - "There is no way the witness can answer that."

M - "I really don't know, I think if I had taken my hands out of my pockets and would have tried to take one of these instruments away from her; I think, yes, she would of touched me with them. I think she could of hurt me very badly too, as a matter of fact I'm certain of that, then I went to a Justice of the Peace and filed a formal complaint."

Sk - "Well, that was after the grievor, Mrs. Beckers, had been discharged, isn't it?"

M - "Not quite after; it was during the procedure."

Sk - "Did you recommend that she be discharged?"

M - "I did not."

Sk - "It was the Manager who did that."

M - "It was the Manager."

Sk - "You had nothing to do with her discharge in terms of recommending?"

M - "I just related to him the facts as they happened."

Sk - "Thank you, you took no action until the Manager arrived?"

M - "That's right, all I did was get her to her machine to get her to work and then I was called to his office."

Sk - "And I put to you, as far as you were concerned at that point the incident was at an end and you did nothing until the Manager arrived and advised you to go to the police and back up your flimsy charge?"

M - "No, I would of done that anyway."

Sk - "No further questions, Mr. Chairman."

C - "Thank you, Mr. Sack. Mr. Sanderson, do you have?"

Sd - "Mr. Chairman, just one or two areas in reply, if I may. Firstly, Mr. Mason, I understood you to say earlier that

Mrs. Beckers was to be given the new job for only a short time while you train the other employee?"

M - "That's right, sir."

Sd - "And therefore she would have only lost money for s short space of time?"

M - "At the most, a week sir."

Sd - "Secondly, you had a discussion with Mr. Sack about whether you gave to Mrs. Beckers a chance to discuss with you why she was being transferred. Do I understand it correctly that she just didn't give you a chance to tell her the reasons?"

M - "No, she just came at me like a bull in a china shop."

Sd - "And you didn't have time to get a word in edgewise to explain yourself?"

M - "Not the way that woman speaks; at the rate she speaks, you know, nobody can get a word in."

Sd - "Thank you very much. I have no further questions, Mr. Chairman.

C - "Thank you Mr. Sanderson. Mr. Barnes, do you have any questions?"

Mr. Barnes (Bn) - "No, Mr. Chairman, thank you."

C - "Mr. Walsh?"

Mr. Walsh (Wl) - "Yes, I have one. Mr. Mason you were the person designated by the company to receive grievances from a union steward?"

M - "I'm one of the ones sir, yes."

Wl - "Well, is it normal on receiving a grievance from a union steward for you to crumple it up and toss it on a table?"

M - "No, that isn't the usual procedure. If it's a serious grievance, we pay attention to it, even if the grievance comes from the steward, about the steward. I think Mrs. Beckers should of gone through another channel, rather than bringing her own grievance up herself?"

Wl - "Well, did you advise her to go through some other channel?"

M - "I told you sir, I couldn't say anything to her; she was to busy nattering at me, swearing at me, and waving a knife at one time, a pair of scissors in my face the other time."

Wl - "Well in all that excitement, did you have a chance to read the grievance?"

M - "No sir."

Wl - "Thank you very much Mr. Mason."

Sd - "Now Mr. Chairman, in the circumstances that this case in view of the fact that the letter of termination is on file with the Board and that letter from the General Manager sets out in detail the reasons for the termination, I see no purpose to take up the Board's time in calling any further witnesses. So that finishes the case for the company, in chief."

C - "Thank you very much, Mr. Sanderson. Mr. Sack."

Sk - "Mr. Chairman, members of the Board, I would like to call Mrs. McQueen to the stand to give evidence in this matter. Would you please call Mrs. McQueen."

(Swearing in of Mrs. McQueen -- Lily) --

"Mrs. McQueen, could you take the Bible please. Mrs. McQueen, do you swear that the evidence that you shall give before the Board of Arbitration, touching the matters in question between the parties, shall be the truth, the whole truth, and nothing but the truth, so help you God?"

Mrs. McQueen (Lily) - (L) - "I do."

"Thank you. Just be seated Mrs. McQueen."

Sk - "Mrs. McQueen, I am going to ask you some questions and then Mr. Sanderson, the lawyer from the company, will ask you some other questions, and the members of the Board may have some questions to ask you, as well. Are you employed by Stormfill Limited?"

L - "Yes, I am."

Sk - "What is your job there?"

L - "I'm a line supervisor; I look after the production on my line."

Sk - "What line is that?"

L - "It's the packing and the trimming line."

Sk - "And how long have you worked for Stormfill Limited?"

L - "Just on ten years now."

Sk - "And how long have you been a supervisor?"

L - "For three and a half years."

Sk - "I would like you to take your mind back to May 24th of this year which was a Friday. Did you know Mrs. Edna Beckers?"

L - "Yes, I know Edna, she is a packer on my line."

Sk - "Did something unusual occur on that day involving Mrs. Beckers?"

L - "Yes"

Sk - "Could you tell the Board what happened?"

L - "Well, on that day when I got there and I usually, I don't have to punch in until 7:15 but I like to get there by the time all my girls are in, and when I got there Mr. Mason asked me to move her, to take her off the packing and put her back on the trimming. I knew she wasn't going to like it, but he told me I had to tell her."

Sk - "Did Mr. Mason tell you why she was being moved from one line to another?"

L - "No sir, he didn't say nothing about why."

Sk - "And did he ask you to give any reason to Mrs. Beckers as to why she was being moved from one line to another?"

L - "No sir. He just said when she comes in to tell her, to go back on the trimming, that's where he wanted her to work."

Sk - "Had she ever been moved in that fashion from packing to trimming before?"

L - "Not since I have been supervising the line."

Sk - "Did you carry out his instructions and do that--inform Mrs. Beckers that she was being removed?"

L - "Yes sir, I did."

Sk - "Was she upset by this?"

L - "Anybody would be upset, yes, she was upset."

Sk - "Why would she be upset by that?"

L - "Well, it meant less money, it was a cut of 10 cents an hour and that was the reason I think, and also she had been a packer for a long time and that's a better job on the line."

Sk - "Why is that?"

L - "Well, it's just a better job, all the girls know it's a better job and it earns a little bit more money."

Sk - "And it has a different starting time?"

L - "Actually, it's a little bit earlier starting time, but that didn't work out with her family; it wouldn't suit in as well."

Sk - "In any event, would you please relate to the Board what you observed after you arrived and after you told Mrs. Beckers that she was removed from her job."

L - "Ah, well, she was mad. She was mad at Mr. Mason for removing her from the job and they were yelling at each other. She was yelling at him in Dutch and he was yelling at her; I guess they were both upset."

Sk - "Did you observe whether the grievor threatened Mr. Mason?"

L - "No sir."

Sk - "Were you in a position to hear and to see if she had done so."

L - "Yes, I was right there."

Sk - "Did she wave in a menacing manner any instrument, any tool, any weapon, in front of his face, around his ears?"

L - "No sir."

Sk - "Had you ever known Mrs. Beckers to use obscene or abusive language before?"

L - "Well, not like this time."

Sk - "Well, have you ever known Mr. Mason to use abusive, abrupt language to employees?"

L - "Yes sir, Mr. Mason yells a lot, he yells at everybody on the line."

Sk - "Have there been complaints from other employees?"

L - "Yes, there have been complaints to me about it."

Sk - "Could you relate what other employees have said?"

L - "Well, sometimes I have had to talk to one of the girls and just say well, maybe he didn't mean it."

Sd - "Mr. Chairman, it would appear that we are getting into hearsay area; perhaps I could repay my friend's compliment to me about my experience; maybe he can refrain from that."

Sk - "Well, I will rephrase the question. Have you complained to higher management about Mr. Mason's abrupt and abrasive manner to employees?"

L - "No sir."

Sk - "But have you yourself received complaints from other employees regarding his behavior?"

L - "Yes, I have."

Sk - "And have you yourself observed Mr. Mason being abusive and abrupt with employees?"

L - "Yes, I have."

Sk - "So in summary, your evidence is that Mrs. Beckers did not threaten Mr. Mason, but that there was an excited argument between them?"

L - "Yes sir."

Sk - "Did you observe Mrs. Beckers give Mr. Mason a grievance?"

L - "The paper?"

Sk - "Yes"

L - "Yes sir."

Sk - "And what did Mr. Mason do with it?"

L - "He wound it up in his hands and threw it away."

Sk - "Thank you, no further questions."

C - "Thank you, Mr. Sack. Mr. Sanderson."

Sd - "Mrs. McQueen, you seem to be a little bit agitated; perhaps you could just relax. I have a few questions that I would like to discuss with you if I may. I think the proper starting points would be to discuss with you your job responsibilities. You described yourself as a line supervisor; in reality, you are a floor lady, are you not?"

L - "Yes"

Sd - "And you are covered by the Collective Agreement. You are in the Union?"

L - "Yes. I work right under Mr. Mason."

Sd - "Yes, I understand. Now, you have told us that you went to Edna, Mrs. Beckers, and told her that she was to be transferred. Did you anticipate that she would be upset?"

L - "Yes, I did."

Sd - "And why is that?"

L - "Because it isn't as good a job."

Sd - "It isn't as good a job, but you knew, did you not, that it would be only for a very short time, just for a few days?"

L - "No sir, I didn't know."

Sd - "You didn't ask Mr. Mason?"

L - "No sir, I didn't."

Sd - "You're suggesting to this Board that Mr. Mason didn't tell you the reasons for her transfer nor the duration of the transfer. Is that correct?"

L - "He just told me to tell Edna to go work on the trimming."

Sd - "You didn't ask any questions at all?"

L - "No sir."

Sd - "You knew that Edna, Mrs. Beckers, was on the union committee, isn't that correct?"

L - "Yes"

Sd - "And you knew that she would be away from the plant from time to time as part of the union negotiations?"

L - "I never thought about that."

Sd - "And you also knew that there was no backup for her?"

L - "Well, I think somebody could of been put in there for a short time. I've done some various jobs on the line myself when it was necessary."

Sd - "I suggest to you that you knew perfectly well the reasons why the transfer was to be made and that they would be for a short space of time only?"

L - "No sir."

Sd - "Do you disagree with that?"

L - "I didn't understand that."

Sd - "Alright, let's turn to the discussion that you have described as a yelling match between Mr. Mason and the grievor, that's Edna. Who started it?"

L - "Ah, I guess Edna yelled first."

Sd - "Yes. How far away were you at that point?"

L - "Oh, I was right there."

Sd - "What did she say to him?"

L - "I don't understand Dutch and when she got excited, she got into Dutch."

Sd - "And there were a few English words mixed in too?"

L - "Yes"

Sd - "And it was a pretty violent explosion on her part?"

L - "Yes"

Sd - "She was very agitated and very upset."

L - "Yes"

Sd - "And some of the English words you heard I suggest to you, were swear words, weren't they?"

L - "Yes"

Sd - "And you're telling me that Mr. Mason in turn yelled back at her?"

L - "Yes"

Sd - "And what did he say?"

L - "Well, he said she should move and do her job where he told her to."

Sd - "Now, you've told the Board that she did not move a knife in a menacing fashion, but she did wave the knife at him, did she not?"

L - "Edna works with a knife."

Sd - "Answer my question, please, would you. She had the knife in her hands."

L - "She didn't wave no knife at him."

Sd - "What did she do with the knife?"

L - "She had it in her hand."

Sd - "And her hand was very close to him, wasn't it?"

L - "No sir."

Sd - "How far away was it? An inch, six inches, a foot?"

L - "I don't know exactly."

Sd - "She also had the scissors in her hand, didn't she?"

L - "Yes"

Sd - "I understand that the scissors were in her hand and her hand was very close to him?"
L - "They certainly, they weren't far apart."
Sd - "Yes, and all the time she was yelling, I'm going to cut your balls off, isn't that so?"
L - "Yes"
Sd - "Yes, thank you very much."
C - "Thank you Mr. Sanderson."
Sk - "I have no questions in re-examination, Mr. Chairman."
C - "Thank you, Mr. Sack."

JOHN SANDERSON, GUEST SPEAKER

If I have any regrets about that film, I've always regretted not asking some questions about hands being kept in pockets, but that was after the fact. We'll break in a minute but can I quickly ask for a show of hands. Bear in mind that the arbitrator rules on the evidence that he hears; that is the tape that you have just seen. How many of you would wipe out the penalty and reinstate the employee with full compensation? How many of you would come somewhere in that extreme; that is, impose some kind of penalty but substantially less than discharge? The interesting feature is that I've seen this tape a number of times and audiences reactions to it and you're just about dead on as to the way people react to it. It's a fascinating example of how reasonable people reviewing the same facts can come to completely opposite results and of course that is what arbitration is all about.

You'll all be glad to hear that we're on the last lap; you have all been very patient with me. Before I deal with the next subject, a couple of digressions. Firstly, several of you have asked questions about this film. There are two tapes that you haven't seen. One is the preparation stage--it shows the interviews by Council with the witnesses, and the fourth and final tape deals with the argument stage of the hearing and then a discussion by the arbitrators as to what they did and why they did it. If any of you are interested, those tapes are available from the media centre in University of Toronto and a large number of organizations both employers, educational institutions and trade unions use this tape as a training vehicle. As a footnote, and I think a rather sad one--immediately after the taping was completed, David Beatty came up to Jeff Sack and myself and said, "Here is a piece of paper, would you sign it"? And we looked at it and said, "What is it"? "Well, it assigns all the royalties to University of Toronto." Neither Jeff or I are graduates of that institution but both of us had the same reaction--this film will never take off--what royalties, why not, we'll sign it, of course. The moral of this story--before you sign anything, get yourself a good lawyer. You win some; you lose some.

The second matter is the result. I'm not going to take advantage of you and try and take book as to who won, but let me tell you what happened. In the actual case, the arbitrator determined that the grievor should be reinstated, imposed a ten month suspension and demanded that the grievor sign a written apology to the foreman, and that in turn was to be posted in the plant. A couple of things to remind you, first of all, that was 1974, and I doubt very much if the decision would of been the same in 1982 and that's good because I think arbitrators have a more lenient attitude towards that kind of activity. In the second place, the concept of a written apology, it pretty well died a natural death. A couple of arbitrators have used the same approach but it does seem to be rubbing salt in wounds and therefore it is seldom followed. If you want to think of it in monetary terms, the woman in question lost about ten thousand dollars and that's a lot of money--that's a very heavy penalty. However, real life is rather strange. There's a happy ending for those of you who think a serious injustice was perpetrated. The grievor in real life wasn't Dutch, she was Italian. She refused to give a written apology and the employer in the trade union said, "Well, that's what the arbitrator ordered." She said, "Well, I don't care, I quit." She and her husband opened up a pizza parlor on Danforth in Toronto and at last report she was earning about four times what she earned in the plant. Maybe justice does triumph.

Alright, let me try and I can only do it very sketchy. Let me try and take you back through the hearing, give you some highlights, try and tie it in to some of the things you have already seen, which I think will make it more understandable. You saw the way David Beatty, Chairman of the Board went through these opening gyriations about jurisdiction and about exculsion of witnesses and all those good things. Then you saw the two Council make their opening statements. The purpose of an opening statement is to advise and instruct the arbitrator on the nature of the case. Because when the arbitrator shows up in the hearing room, he doesn't know anything about the case. He doesn't know whether it's a discharge case or a vacation matter. He knows the names of the parties, that's it. So what you're trying to do in the opening statement is to briefly describe for the arbitrator the nature and substance of the case. Therefore invariably I want to make an opening statement because I want to plug him into the case. A couple of words of caution though. Your opening statement should be brief, it should be balanced; that is, if you say that you're going to be hearing evidence of insubordination, you better be sure you can back that statement up. And it should be nonargumentative. Don't get complicated, don't get descriptive; try and make your opening statement fair, balanced, reasoned, and short discourse as the nature of the case. It doesn't matter which side goes first; that is, whether it be the union side or the management side. But both sides normally make an opening statement. As an additional observation, the opening statement is a good time to admit certain facts. You heard me when I was making my opening statement say to the Board--there is no dispute on the fact that this person is an employee; there is no dispute concerning her calssification or her seniority, or on the fact that we're not relying on the prior discipline record; that was generous of me bacause she didn't have a prior disciplinary record. Alright, why don't I say that. I know that is going to be the thrust of the union argument, so I may as well get it out on the table. I might as well say to the arbitrator, "We're not relying on this." Now hopefully in part it spikes their guns. That's part of the minor role playing that goes on in this. I tell you that not because I want to show what an experienced person may do, but simply to remind you that you have to be careful not to get carried away with the gamemanship. It isn't a game. One is dealing with some very serious matters and its too easy for all of us, myself included, to get caught up in the thrust in the gamemanship of the arbitration process. If you do that, it's not you that pays the penalty, it's the person or party that you are representing. So if you are going to present cases, you owe a responsibility to the party that you are representing not to get carried away with gamemanship, fun as it may be.

Then you come to the evidentiary part of the hearing. Now, in a program such as this, it's not really possible to give you in detail how to examine a witness. But it is not as difficult as many people, including many lawyers would have you believe. Indeed the key to it is to do your preparation in advance, to work out the checklist which I told you about and to plan, to organize your examination. If you have done that and if you have interviewed your witness, you know the questions you are going to ask and you know the answers the witness is going to give. So you have no reason to be concerned. All you have to really deal with now is the mechanics.

Now my first rule to you, is don't ask a question that you haven't already asked your own witness in the interview. You should never ask a question that you haven't already tried on the witness. Secondly, ask your questions in a simple, orderly way. There is nothing worse than for a witness to be examined in a half-hazard way; particularly with respect to time events. So what you do is you ask all the questions you want to ask about a given subject and then you move on to the next subject and so on. The easiest system is to take the witness through the evidence in a chronological order--when did you arrive at the plant, what happened then, what happened next and so on. If you skip back and forth like a legal waterbug, you are going to confuse things, particularly the arbitrator. My next rule to you is to suggest that you should frame your question as simply as possible. Try and avoid big words, complex questions, and at all times avoiding multiple questions. One question at a time. My next rule is to say to you, what seems awfully trite, wait until the witness has answered the question before you ask the next question. That is particularly difficult if you are not experienced. You're excited, you're adrenaline is running and you get carried away with what you're doing. Remember the arbitrators take all this information down in long hand in their notes and if the arbitrator hasn't got it in his notes, you're in trouble. So I not only wait until the witness has answered the question, I wait until the arbitrator has stopped writing. Yes, it's tiresome, it's tedious and it takes time; but I have long since learned that there is often a time lag between the end of the hearing and the ultimate sitting down by the arbitrator to write an award. The busy arbitrators handle as many as 150 to 160 cases a year. In my own practise I not infrequently argue five cases a week. Now there is no way you can keep track of that sort of thing, unless your notes are complete. From an arbitrators point of view, it may be three or four weeks before he sits down to write the award, but in that intervening period he has heard a lot of cases. So he is going to rely heavily on his notes; therefore, it is imperative that he gets the evidence into his notes. The only way you can insure that is if you watch his pen. A couple of things you can't do in examination in chief--you saw an example of this in the film--you can't ask a leading question. That's why Jeffrey Sack got a little upset, but Jeffrey gets upset at me all the time anyway. A leading question is one that contains the answer. If I say to you, I understand you arrived at the plant at 7 O'clock; that is a leading question. The proper way to ask that question is, when did you arrive at the plant? So its the evidence of the witness that is being heard. The other rule in terms of examination in chief is that you cannot cross examine your own witness. Let me explain myself.

If you get an answer you don't like, or an unexpected answer, you can't say to the witness--well now, I didn't understand that question, I want you to go over that again. You would be stopped. You're stuck with the answer you are given with the form in which it was given. Well that makes good sense because the arbitrator is saying effectively, you're the one that called the witness and if the evidence is adverse, that's your problem. You shouldn't have called him in the first place. So call a witness at your peril who you haven't interviewed and that's the precise reason why you should never ask a witness a question which you haven't already asked in the interview. Otherwise you get an answer you don't like or an unexpected answer and you can't cross-examine your own witness. Now that's about all I can usefully say about it and you may well have questions for me in the question period about the subject of examination in chief. Remember this check list--remember to tick off each point as it is made and remember to look at your checklist before you complete your examination in chief to be sure you covered all the points and that alone will save you a lot of trouble.

Just an example to make my point. A few years ago there was a case in front of the Canada Labour Relations Board. It involved a wildcat strike. The employer was represented by a very experienced council in the courts not on labour matters. I'm sorry it was in the Ontario Labour Relations Board and the matter was heard by the Board and the employer called four days of evidence--A large number of witnesses who described in graphic detail what had happened--the instance in the picket line, the terrible hardship to the employer and all of those good things. At the end of the four days the Board turned to council for the union who is now the Deptuy Minister of Labour in Ontario, Tim Armstrong--who I say publicly was the best council that I opposed over my twenty odd years in practise. In any event, Tim stood up and said on behalf of the union, "We're not calling any evidence." Well everybody including Tim's own client was somewhat stunned by this. But he was the only person in the room that had detected a flaw in the employer's case. So the employer was then called upon to argue, did so, and presented an eloquent detailed analysis of all of the law for a day and a half. Then Mr. Armstrong was called upon and his argument was just about this short and this brief. He said, "One of the conditions to establishing that an illegal or wildcat strike took place, is that the strike takes place during the lifetime of a collective agreement. My friend and the employer have not placed in evidence a collective agreement. There is no evidence before this Board that at the time this strike took place, there was a collective agreement in force. Therefore you must dismiss the application. Thank you very much." And that's indeed what happened! We're all human, we all make mistakes and the employer had simply overlooked what was the central part of the case. All he had to do was to present the agreement and prove it through a witness, which was a very easy proposition but it was too late. That's what this checklist is all about. That should not have happened if you follow what I suggested and you done a proper job of analysis in the first place, it won't happen to you.

Our next topic in this rather quick analysis is the subject of cross examination--a subject dear to my heart and one that no one knows everything about, myself included. It's a fascinating subject and I won't bore you with what I considered to be the art of cross examination as distinct from the act of cross examination. It is an art form and it's a fascinating one. I contradict myself once more by saying to you that the first question you have to ask yourself before you cross examine, is should you cross examine, because too many people feel there's an obligation to cross examine. If the evidence is not in dispute or if the evidence may be in dispute or it is inconsequential, it doesn't matter whether the foreman arrived at 7:00 or 7:10. Why cross examine? What have you to gain from the cross examination? You should have a purpose before you cross examine. However, assuming you are going to cross examine, how do you do it? I'm being overly simplistic but there are two broad schools of thought on how to cross examine and to a degree you saw two examples of it. They're usually defined in old military style. One is the bludgeon approach, where you aggressively wade into a witness and the other is normally described as the rapier approach, more subtle, more discreet, and frequently more effective. That is not to say that you may not choose to mix them; with some witnesses you may be more forceful and aggressive with and others you may choose to be more cautious with. But remember what you're doing, what you're trying to accomplish in most cases through cross examination is to extract from a witness information the witness does not want to give you. Either because the witness has overlooked it and forgotten it or because the witness has distorted certain facts and certain information. You start with the premise that you want to get from the witness information that that person does not want to give you. But if you're going to be effective in cross examination, you don't want to let the witness know that. You don't want to let the witness know where you are going and that requires obviously some organizational skills and some rather quick thinking. The most effective cross examination of all is where you have taken a witness and quietly extracted the information that you want from the witness and you said to the witness, "thank you very much" and the witness doesn't even know that he/she is giving you the information that you are seeking.

Now in cross examination, you are entitled to ask leading questions. So you have certain advantages; one, you know where you're going, that is you know the information that you are seeking. You may not know the precise information, but you know that something isn't ringing true. The more experienced you are in this business and this applies not just to representatives but to arbitrators, the more finely tuned your instincts are, you're not going to be always right but there have been many experiences where an experienced person has said, "You know, something is wrong here; I'm going to cross examine. I don't know what it is, it just doesn't make sense to me." The second advantage you have is that you can ask a leading question which means you can frame a question in such a way that the witness has to answer "yes" or "no." Now that's a very effective way to ask questions and you can build on those and you can start in a fairly neutral area and gradually work into the more contentious issues and get the witness to answer "yes" or "no" to a whole series of questions. The third advantage you got is that you can ask questions of the witness on any relevant matter, whether that witness has been examined in chief on those matters. That sounds rather ponderous, let me explain myself. One of the serious risks of calling a witness on your behalf on some narrow issue, is that it leaves witnesses open to cross examination not only in the issue that you have examined your witness, but on any other subjects that is relevant. So the cross examiner can say, "Well, I don't really care about whether the foreman arrived at 7:00; sure you confirmed that. But I'm going to ask a lot of questions about what that person observed at 8:00--that's when the incident took place." And once the employer has called that witness, he can't turn around and say that you can't ask questions about that. Now, it's true the matter has got to be relevant to the grievance, that is you can't go off let's say into the witnesses tax problems. But you certainly can ask whatever questions you wish about what that witness observed about the events and the incident in the plant. So in short, you got the advantages.

Now, we make a point that some of you may not appreciate, but think about it though, and that is particularly in cross examination when you get an answer that you like, when you get the information you are seeking, don't ask the same question again. You know, time and time again, a representative asks such and such a question, the witness responds, that's exactly the answer that you wanted, and the representative says I'm going to drive it home once more. I'm going to be sure that the arbitrator heard that answer. He asks the question again and the witness says, "Well, now let me think. No, no, no, no, no, no! I'm sorry, I was wrong. No, it didn't happen that way at all." Now we all do it, but as much as possible, don't you do it. Don't gild the evidentiary lily; you got the answer you want, great, pass on to another subject so that the witness doesn't get another chance to change his mind or contradict what he said or to bury the information.

Now, in cross examination, and particularly in cross examination, you should in my view at all times be in eyeball contact with the witness. Body language is important. It's instructive and if you're experienced, you can learn to read people very well, so don't waste you're time taking notes in cross examination. Have somebody else do that for you. Watch the witness carefully--Is the witness tense and obviously nervous? Watch the body language, not just of the witness, but of the arbitrators. If the arbitrator is leaning forward and his pen is poised, then obviously the arbitrator is very interested in what's going on. If the arbitrator puts down his pen, folds his arms, and looks up at the ceiling, then you're not making very good progress. You had better pass on to something a little more eventful and in between those extremes, there are lots of variables. My point to you clearly is that people, and in particular witnesses, show their concern, show their tension, show their problem through their body language. So read it and be informed by it.

Let me tell you a story just to lighten the subject because I don't care how experienced you are, in cross examination you are still going to be surprised, sometimes by your own stupidity. In this particular matter I was cross examining a grievor in an assault case. The evidence was that the foreman of the plant walked around the corner of the tool room in a plant and the grievor had threatened him with a very large hammer. The grievor gave evidence on his own behalf and the grievor's account on what had happened went something like this. He said, "The hammer was attached to the back of a crib door and it was about waist high and it was hanging by its head from two nails. He opened the crib door, the hammer was jarred loose from the two nails, he caught it before it hit the floor, straightened up like this, and that's how come he happened to have it in his hand when the foreman walked around the corner of the tool room." Well, I looked at the grievor and he was 55 portly, looked even older than I do, and I thought Gee you know, this guy's got to have the reflexes of an olympic athlete; that just doesn't make sense to me. So being a bit of a ham I thought well I'll dramatize this. I had the hammer with me and I said to the witness, "You come forward." He did so. Stood him in front of the arbitration panel and walked forward and said to him, "Now show me the exact height the hammer was on the door." He held his hand. I said, "Are you sure?" "Absolutely sure." "Are you absolutely sure?" "No question." I said, "Alright, I'm going to hold my hand out" and I did at the exact height. Now I said, "I'm going to count to three and when I count to three, I'm going to open my hand, drop the hammer and you catch it before it hits the ground." Well everybody sat up and thought, this ought to be fun. It's a long tedious day. And once again Earl Palmer was Chairman and he tells the story even better than I do. So I dramatically intoned, "one, two, three," opened my hand and of course there was no way he could catch the hammer. What happened though, was that I dropped the damn thing and it weighed eight pounds on my own foot! And if you think that doesn't hurt, let me tell you. Palmer kept his face absolutely straight and when I stopped hopping around and things had calmed down, he looked up and said, "Mr. Sanderson, I wonder if we could have that evidence repeated, it's not in my notes!"

O.K., let me complete the evidentiary part with two quick points. I talked about examination in chief, cross examination. Now let me touch on reply or redirect. The party that called the witness has the right to redirect the reply questions. But remember that those are questions only of the witness that arose out of the cross examination. So in the example you saw, I didn't ask any questions of my witness, Mr. Mason, the foreman, as to his relationships with other employees and problems he may of had. But Jeff Sack from the Union did. Therefore, I was entitled to ask questions of him in redirect and that is what redirect is all about. The other point I want to make to you--I have already touched on--and that is, when the evidence has been heard by one side, the other party has the right to elect whether to call evidence. You're under no obligation. There are cases on occasions when you shouldn't call any evidence because there is no case that you have to meet but that is a tough and difficult choice because you had better be right. There is nothing worse, believe me, then making that kind of decision and that ultimately receiving the arbitrator's award when the arbitrator said, "Well, the employer didn't call any evidence in that point," and your client calls you up and says, "Why not?" So it's a tough judgement call, but in the proper case it is the one to make. My advice to you is err on the cautious side. The less experienced you are, the more you should be certain that you called all the evidence that is helpful on your side.

Now let me turn to the argument stage. This is the part that you haven't seen on the tape. We talked earlier about preparation. You know the kind of argument you want to make but how do you in fact make it. Well the simple formula I would advance to you is that you begin by saying to the arbitrator I have three propositions to make, three submissions that I wish to advance. Then you recite those submissions in order. You then deal with each one in detail in the same order in which you advanced them and then finally you conclude by summarizing those submissions. So in short you tell the arbitrator what your arguments are going to be. You then make your arguments and then you summarize the arguments that you already made. Now the critical point is that you want to be clear, you want to insure that the arbitrator understands your argument. The trouble is most poeple are so busy trying to be persuasive, that they are not clear. They forget to explain their arguments in the first place. They are too busy trying to convince the arbitrator that they are right without recognizing that the arbitrator first of all has to understand what they are saying.

So if I can give you a musical scenario. I remember hearing Leonard Bernstein describe Beethoven's Ninth Symphony--a very long work of music. One of my favourite works. Bernstein said that every note, and that's about fifty minutes of music, is inevitable. A lovely praise! Similarly a good argument in an arbitration case should be pared down to the essentials, and every part of it and indeed every word of it should be inevitable. If you use another anagology, what you're really doing is painting a picture with words. You're saying to the arbitrator, here's my argument and I'm going to use language and terms that ensures that you understand. Here again, watch the body language. Try and read the arbitrator. Try and judge whether he understands. I go further, at the end of my agrument or indeed during my argument if I detect that the arbitrator doesn't understand, I say to him, I take the blame even though as far as I'm concerned it's the dummy of an arbitrator. I say to him, "Obviously I haven't been as clear as I should. Obviously, Mr. Arbitrator, I have confused you; let me try again." Now it's imperative that he understands your argument because how can you expect him to agree with you if he doesn't understand you. Now your argument consists of an interweaving of three components: the evidence (the arbitrator has already heard the evidence), the collective agreement, and then any precedence or any legal theory that you are going to draw together. So what you do, is you briefly and that's the key word, summarize the evidence on the matter, and I remind you again it should be brief; don't stand there and regurgitate all of the hours of evidence that the arbitrator has heard. Incidently, don't misquote the evidence. Be fair and balanced. So you describe the evidence the arbitrator has heard on that point and you say to him, "I want you to look at Article 1805." Take a minute and let the arbitrator look at 1805. In fact, read it with him; that's the provision in the agreement that bears on this subject. Then say to him, "Now, my interpretation of that article in relation to the facts is thus and so." You may have cases, you may have references to the text that we have talked about, or in the absence of that you may have to develop your own theory and don't be concerned about that. Merely because there isn't a case to support you, doesn't mean that the proposition is not valid. Indeed I go further with you. Too many people have advanced too many cases. They put forward a whole wealth of arbitration cases on the general theory that the more cases, the more volume you present, the more likely it is that the arbitrator will accept that proposition.

My late law partner, Allan Clark, who was a brilliant council, once said to me as I was rushing out of the office with a whole pile of precedents under my arm, "John, I guess you got a pretty bad case if you have to cite all that law and support." And that's very true. So it's quality, not quantity. Quality in the sense of a case that is clear and that supports the proposition that you want to advance. Just a brief footnote--If you're going to use a case, the more recent the case the better. If it is a case that is backed up by other cases, that is if it demonstrates some scholarship, that's equally as good. Finally, it should be by an arbitrator that has some reputation and stature in the field. My point to you is, don't go into an arbitration case with 30 or 40 case references. Try and pair it down to the ones that are strong and supportat~~ive of~~ the position that you have to make.

Now finally before I conclude, let me run over the order again. The party that calls evidence argues first. So in this tape the employer had to argue first and the Union then replied. Your arguement if you go first or if you go second, it doesn't matter, should be constructive. Remember that the arbitrator has to make a decision and your role is to try and give him a logical, coherent way to reach the conclusion that you want him to reach. So it is not noise and bluster, nor is it rhetoric; it's logic. Clear, reasoned logic. The most effective argument is one once you heard it, you say the result is simply inescapable. It's just no other possible answer and that's the most effective of all arguments.

Now we've got fifty minutes. I promised you I would leave lots of time and let me stop at this point and let me invite you to ask questions or make comments, interjections, no chair throwing but anything short of that is quite acceptable.

QUESTIONS AND COMMENTS

Q. Is the arbitrator obliged to receive and apply American cases?

A. The answer is No. The arbitrator is not obliged to. He is perfectly free to decide that the American cases plus forty cents will buy you a cup of coffee, and he is not going to pay any attention at all. Indeed there are some arbitrators that have a mental block on the subject, but somehow anything in the United States by definition is not to be given any weight at all. We find that in particular in the courts I might add. I think that is unfortunate but that is the way it is. Let me expand upon it. Lets assume you cite five cases, it doesn't matter whether they are American or from B.C. or Ontario or wherever. The arbitrator is perfectly free to go out and do his own research. He is perfectly free to go to his library if he has one or go to to any other source and to read all the cases that he can find on the given subject, and to issue a decision that is not based on the cases that was actually cited to him. So don't kid yourself, the fact that you haven't cited a case, doesn't mean that the arbitrator can't go out and find if for himself. I quickly add, the arbitrator is not allowed in law to go out and find evidence, he's bound by the evidence. He can't inititate an inquiry of the facts, but he is entitled to rely for example on his own experience and to say I think I decided a case or I ran across a case ten years ago on that point. Go back into his files and dig out that case and say "yes". Now here is a case with certain reasoning that I find attractive. So it is one of these situations where the arbitrator is quite free to go off in his own direction. This tape is an interesting example of that. In the actual case, the Galco Case, the one that is reported, David Beatty set out the theory of rehabilitation; which is a theory that has given arbitrators some concern and frankly some mixed views. In any event those cases weren't argued by either side, but David with his scholarly mind had done some research on the general subject and he decided that this was the proper case for him to expound that theory and did so. Notwithstanding the fact it hadn't been argued by council.

Q. I actually have two questions. One is relevant to the information you brought to us today and one goes a bit beyond that. The first question and it's relevant to the exclusion of witnesses. I'll use your tape as an example. If, and we have to change the onus here, if in this particular case the union actually went first, obviously the foreman would have been a key element in the presentation. Would it be proper for the other party then to use him as an advisor, keep him in the room, even though he is a key witness and could have the union proceeded to have him excluded because of his importance to the case?

A. If an order is issued excluding witnesses, both parties are obliged to exclude their witnesses. So if that had happened and I am assuming now that the onus is reversed and that I would have gone second, I myself would have excluded the foreman. I would have had to.

Q. The second question goes beyond the hearing stage and in this provicne we have experienced in the recent past a couple of problems that haven't been experienced before that. It is relevant to the implementation of awards. Too many times in the recent history we have experienced that awards have come down from arbitrators and there has been a reluctance or an absolute refusal to implement them and I wonder what your experience is in that regard in other provinces?

A. I have only taken a very quick look at your act but I see nothing in the act that obliges or enables a party to file an arbitration award in the supreme court and enforce that judgement as a judgement of that court. Such a provision is found in most jurisdictions elsewhere including Ontario and what I am saying to you is that when an arbitrator's award is released, the parties sit down and discuss its implementation. If one side refuses to abide by it, the other party can take that award, file it in the supreme court of Ontario and it then becomes by statute enforceable as a judgement of that court. That means if the employer, that's usually the problem, refuses to abide by that award, then contempt proceedings can be brought against that employer and in a proper case a very large fine and if necessary a jail sentence can be imposed and that's not theoretical. There's an owner of a nursing home who refused to abide by an arbitration award about two years ago. As a consequence of his refusal he ended up spending thirty days and nights in jail. So it is a serious business.

Q. So we apparently have a weakness in our act or our legislation?

A. I think you do. I think it is something that can be usually corrected and frankly in terms of the general health of labour relations, it may seem strange coming from someone who normally represents management. I think that change should be made.

Q. I'm wondering what the experience has been in other jurisdictions relevant to the delay in awards being handed down. Is there a lengthy delay in other jurisdictions?

A. That's a tough one; it's tough because it depends very much on the arbitrator. There has been a conscious and deliberate effort by most arbitrators in most jurisdictions to try and clean up their act and try and get out awards promptly. The trouble is that some difficult cases require a lot of time and thought and care. Certainly things are now much better than they were and there is a much less time lag between the actual hearing and the ultimate award. There still are absolute horror stories. I can recall one case where eleven months went by and the arbitrator then said to the employer, it happened to be Bell Canada, "I order you to reinstate this employee with full compensation." You know, like eleven months of salary and there wasn't anything the employer could do about that. That kind of thing should never happen; that is unfair to the employer ~~and~~ its equally unfair to the employee who is left dangling for this eleven month period without any knowledge as to whether he got a job. Well, those situations are getting fewer but regretably they still exist. But you know the market place works its magic. That particular arbitrator is no longer doing arbitration work because both unions and employers were saying we don't need that. We want an arbitrator who is going to give us two things and I think this is the test of a good arbitrator. One, he is going to give us a fair hearing and I mean fair in the legal sense, that he is going to give us and the other side an opportunity to fairly present our case and to argue our respective submissions. Secondly, we want an arbitrator who is prepared to make a reasoned decision. You may not agree with it, but he is going to make a decision and he is going to give reasons for it and we will at least understand what his reasons are. If you get that kind of an arbitrator, you really don't have much to complain about.

Q. (Not on Tape)

A. I would have thought that the obligation to bring such an application would be on the party that obtained the award. So if the employer refused to abide by the award, presumably the union would bring that application. The problem with that is, of course, is all you end up with is a summary conviction fine and what you're really concerned about or I assume you're concerned about, is the actual implementation of the award itself and to extract a smaller, mild fine out of the matter really doesn't help things, besides it will take in most cases a long time before that winds its way through the various proceedings. That is why other jurisdicitions have followed this practise of saying well let's cut through that, let's enable the party who feels the party wasn't implemented to file it in the court. Then we will deal with that as a judgement of the court.

Q. (Not on Tape)

A. Yes, I would guess that the Minister in the Department would say, "Well, we're not going to get in between the parties, we are going to require the parties to come to us, rather than us inititate action." I would guess that, that is their reaction, I don't know.

Q. To go with a further step, in your initial remarks, the whole purpose of arbitration is to offset the instant arbitration of past history where the parties take instant action, they walk out on strike. If the legislation is not working, then the only thing that is left to the labour movement in this case, because these cases that I cite are relevant to cases unions won, would be to take the matter into their own hands and then go back to the archaci stage of walkouts and strikes to demand this.

A. Sure, I'm the last person obviously to advocate that but you know my thesis from the beginning is to say to you, all of you on both sides, that I think it is imperative that this process work effectively and be perceived to be working effectively; because if it is not, if either party or a given institution in their own short-term interest tries to play games, the long-term effect may be exactly what you put forward and that is the possibility that what is euphemistically called economic action--wildcat strikes take place, and everybody loses from that. That's why in other jurisdictions there's a lot of attention being paid to making the process work effectively. I assume and perhaps I'm naive, I don't think so, I assume that is one of the purposes of this conference and that is one of the reasons why all of you are here. Because you recognize, at least in part, the truth of what I am saying that from the point of view of P.E.I., if the grievance and arbitration process is seen to be working effectively, then the entire labour relations community benefits from that and the reverse is equally true.

Q. (Not on Tape)

A. Well from a purely legalistic point of view, the oath is administered by the arbitrator and requires the witness to take the oath in the right hand and to raise the left hand and to affirm the oath. But you're right, it is seldom administered in that closely structured way; in fact, in our society there are many people who refuse to take the oath of the Bible and are "affirmed". That is they "affirm" that they will tell the truth, the whole truth and nothing but the truth. Now that is just as much a legally binding oath as if it is administered on the Bible. Don't be mislead by this subject though; the fact that the oath is given and administered, guarantees nothing, quite obviously. The only relevancy of it on a legal side is that if a witness knowingly gives evidence under oath, then it is possible that perjury charges can be laid if that evidence is given falsely and is known by the person giving it to be false. There are only two cases that I am aware of where perjury charges were laid and in both cases the charges were dropped before the matter got to trial. I happen to think the importance of the oath is not legal, it is psychological, and that is that people treat the matters more seriously. They are more inclined to recognize the importance of the arbitration hearing, and I happen to think that is good, if the oath is administered. That is why as a general practise, unless the evidence is non-controversial, I want the evidence to be given under oath, and most arbitrators of their own volition will agree with that.

Q. (Not on Tape)

A. The question really deals with time limits and the issue as to an arbitrator's jurisdiction because the time limits have been breached and George is asking me to define what is a mandatory versus a directory time limit, because that is what the arbitrator will do. Let me take you back in order to explain myself. Let's assume under the Collective Agreement that the grievor has ten days to file his grievance and let me assume that thirty days goes by before the grievance is filed. Now the employer at that point has two options: The first is to say the grievance is untimely because the agreement says you have to file within ten days. Thirty days have elapsed; therefore, I won't even hear the grievance. That's his first option. His second option is to say the grievance is out of time, but there is still a problem here and I am going to hear the grievance anyway; notwithstanding the breach of the time limit. As to which really goes, that is obviously a difficult question. I remind you again that the technical half versus the labour relations half, is perhaps the key to it.

In any event, let's assume the matter goes to arbitration and the arbitrator is faced with the issue of time limits and the employer says, "You've got no jurisdiction. The grievance says ten days; it's thirty days as of the date of the grievance; therefore you can't hear the matter." Well that is not a new issue. Arbitrators have been dealing with that subject for many, many years. Most arbitrators properly strain to find jurisdiction. They want to hear the merits of the grievance. So what they have done and I don't mean this sarcastically, is they have erected a rather fine semantic distinction between mandatory and directory time limits. I think, George, the bottom line is that if the arbitrator wants to find jurisdiction, he finds that the time limits are directory and if he doesn't want to find jurisdiction, he finds that the time limits are mandatory. I say that with some confidence because that is just not my view, it is the view of the Supreme Court of Canada in the Union Carbide case.

This is an area I don't intend to take you through in detail but I assure you there are holes to cases. What am I trying to say to you? Well a directory time limit is one where the time limit is there but the arbitrator still has a discretion whether it should be applied. A mandatory time limit is one that is binding on the arbitrator and he's got no discretion regardless to the circumstances. He must apply it. Arbitrators decide which is which by reference to the clear wording of the agreement. Well that is a problem because the agreement is seldom clear. However, many Collective Agreements have attempted to solve that dilemma by saying that the time limits are mandatory or have said, an arbitrator has no jurisdiction to hear a grievance that is not filed within the appropriate time limits in the agreement. I happen to think by in large that you should try and clarify that issue in your own agreement because otherwise neither the union nor the grievor nor the company really know which is which. Legislatively this whole problem has been made academic in Ontario, in B.C., in Saskatchewan, and in Manitoba, and I think in Nova Scotia. What has happened is that an amendment was placed in the statute whereby notwithstanding what the collective agreement says, an arbitrator has jurisdiction in discharge and discipline cases to relieve parties from time limits. You know, it is a bit complicated. It goes beyond discipline in discharge cases in some circumstances but the net effect is that this semantic distinction between directory and mandatory no longer exists because the arbitrator, never mind what the grievance says now, has legislative authority as a discretionary remedy; the arbitrator can decide the grievance is out of time and there is no excuse for it and therefore I am not going to hear it; or he can say, I'm satisfied that the grievor tried to file the grievance within a reasonable period of time and therefore I am going to exercise my discretion and hear the grievance anyway.

Finally, and I am sure I confused some of you, I draw an important distinction between time limits for the purpose of compensation. You got two bites of the apple--Assuming the grievance has been delayed for an appreciable period of time, the first is you argue jurisdiction. If you don't get anywhere there, you're probably going to argue (if you don't, you should, certainly as an employer): Mr. Arbitrator the grievor sat in his arbitration rights; he didn't file a grievance for a month; therefore the employer not withstanding what you do, should not be held responsible for that, and therefore there should be no compensation beyond the date of the grievance even though the discharge took place a month previously. Since the grievor waited for a month, the employer shouldn't be held responsible for that month. Most arbitrators will accept that argument and I think properly, why should the employer be saddled with liability where the fault, the failure to file the grievance in the first place is that of the grievor. So time limits deal with a jurisdiction but they also deal in some cases with compensation.

Q. In connection with the cross examination period, the question is to do with the intervention of the arbitrator himself in the progress of the issue. To what extend does he/she intervene in aspects that are brought up. For example, the technique employed by the representative. To what extend can the arbitrator object to the brow-beating of witnesses? The second question was about the difficulty in the film to get a straight answer "yes" or "no" in the cross examination period. The witness simply refused to say "no". At what stage should the arbitrator say, "O.K., hold it, no more, I'll take that as a no."

A. Essentially the answer to both your questions is "yes". The arbitrator runs the hearing; it's his show. He is free to take a fairly active role in the proceedings; particularly if he thinks that there is any kind of an injustice being perpetrated and indeed in a proper case the arbitrator can and should stop any brow-beating of any witness and protect the rights of that witness. Now, in the first place and normally the responsibility is that of the representative of the party to say, "Wait a minute, the cross examination has gone too far." Then the arbitrator then rules, "Yes, it has, no it hasn't." But in a proper case the arbitrator may of his volition, intervene. Now I say proper case because the arbitrator walks a fine line. One, he is trying to ensure a fair hearing to all parties; but two, he doesn't want to interfere unfairly and thereby give either party an advantage. That's a fine and difficult judgement role, but in the last analysis, it is his hearing and his proceeding and he can interrupt if he wishes. Now that sets up a counterveiling problem and that is, in a proper case, you as one of the representatives may have to object. Supposing the examination is complete, cross examination is complete and the arbitrator says, "Well, just a minute; I want to ask some questions." Then he starts to cross examine a witness. You may have to gently and diplomatically remind the arbitrator that he is an arbitrator, not a council. This has to be done only as a last resort because you don't want to antagonize the arbitrator but in a proper case you may have to. That's your role. On the other hand, the arbitrator is perfectly entitled to ask a question for clarification.

The second question you asked--he can say to the witness, "Look, enough is enough; I don't understand your answer. What are you trying to say? Is it this"? There is nothing wrong with that although it should be used sparingly. As much as possible the experienced arbitrator allows the parties to conduct their own case in their own way. He makes the assumption that the parties know what they are doing but on the other side he is going to hold the parties accountable for what they do and don't do. Now, that seems fair to me, fair ball. Having said that, I come back to my starting point, and that is that the arbitrator has the right and indeed the responsibility of running this hearing and conducting the proceedings in such a way that he understands the issues, he understands the facts, and he is in a position then to address the problem the parties have brought to him. The trouble is, some arbitrators try and take over for themselves the conduct of the hearing. They forget that they are there because the parties have brought to them, the arbitrators, a problem. It is not their function to create a new problem and then answer that problem that they think is an interesting one.

Q. (Not on Tape)

A. Sure, in fact, in many situations there is a double standard applied. A union representative is given by most arbitrators far more leeway then I am given. I'm held to a much stricter and higher standard of conduct than you are. You who are union reps are normally given a good deal of scope than I am given. I'm not objecting to that. That probably is fair ball, but don't be defensive about it. Don't get the impression that because there happens to be a lawyer on the other side acting for the employer, that you're going to end up losing the case. There are lots of lawyers that I know, even some in the Labour Relations field who are no match for some of the union reps that over years developed a good deal of expertise in this area. One of my favorite people over the years is a retired team rep named Duke Thompson. Duke has heard, has argued more cases in front of the Ontario Labour Relations Board over the last thirty years than anyone, lawyer or otherwise, management or union. Duke is an expert at what I call a country cousin bit. You know, this business of saying, "Gosh, golly, Mr. Chairman, I'm not a lawyer and I don't understand all these here legal technicalities and let me try and fumble my way through as best I can." In one particular day, it was a hot and steamy day in mid-July and Duke and I and a couple of other people were arguing a very tricky constitutional point in front of the Ontario Labour Relations Board. Duke got up and he started that bit and Don O'Shea, who is a well known arbitrator but at that time was one of the vice-chairmen of the Labour Relations Board, looked down and said, "Oh, horseshit." Thompson, bless his soul, looked up and said to the Chairman, "Why, you can't blame me for trying," and launched into an absolutely brilliant and very perceptive analysis of constitutional law. So, did any of you a number of years ago watch the "Watergate Hearimgs"? Remember Senator Sam Irvine, Chairman of the Senate Investigation Committee--just a poor old country lawyer from South Carolina. One of the most skilled and cross examiners that I have ever seen. I sat there night after night; I was enthralled. I have seldom heard anyone as brilliant, and perceptive, but all done in a sleepy, relaxed country drawl, and some of the hot shot lawyers were carved up one side and down the other, and they didn't even know what had happened to them! They actually would thank Senator Sam. They would say, "Thank you very much." And the knife was sticking up their back and Sam would smile and say, "You're welcome." So don't kid yourself; you can be very good and very effective at this business and you don't have to be a lawyer.

Q. (Not on Tape)

A. Linda's question to me deals with an agreemnt initially by the employer and the union. Yes, the time limits have been breached but we will deal with the grievance anyway and then ultimately as I understand you going to arbitration and the employers saying, "Now, well wait a minute; this grievance is out of time." The simple answer to your question is that the employer is deemed to have waived the time limits and can't now change his mind. So once you decide as an employer, well O.K., you're going to ignore the fact that the time limits are breached and you are going to deal with the grievance as a matter of course, then you're stuck. You can't turn around at arbitration, having waived the time limits in the first place and say, "Right, the time limits have been breached and therefore as an arbitrator you can't hear the matter." It goes back to this concept of fairness. It pervades this entire doctrine and it goes back to something I've stressed a number of times and that is you're held accountable for what you do and what you say and it follows that if either party waives the time limit, why should they be given the right to change their mind later on, because the other parties relied on that waiver and they're going to be held to it and that is essentially what arbitrators do and say and I think properly.

Q. With all the best preparation in the world, one can be faced with a decision, whether or not to cross-examine. It's a very tricky thing and dangerous too as things come up unexpectedly and one wonders whether or not to do it. My question is, what sort of time delay can you ask the arbitrator for before you say, "Yes, I want to cross examine?

A. I've never known an arbitrator who wouldn't give you a few minutes while you make a decision of that nature. I think it would be wrong, for example, once you have started your cross examination to then say, "Now, before I ask anymore questions, I want an adjournment." But I think you're certainly within your rights; indeed I think you're wise in many cases if before you embark on a cross examination, in order to give you time to briefly reflect, if you say to the arbitrator, "Now before I began my cross examination, I would like a few minutes while I consider that subject." Then I think, if put in a respectful way, the arbitrator will say as a matter of course, "Sure, that's fine." I think five or ten minutes is probably an appropriate time frame. It has the other advantage, apart from the fact it gives you a moment to think, is it breaks up the proceedings and people are frequently a bit tired by this stage and need a break. On the down side, remember it gives the witness an opportunity to compose himself and to sort of gather himself for the beginning of the cross examination.

Q. One area I'd like a comment on is the actual composition of the arbitration board itself. I'm interested in hearing your comments on, what should the parties be looking for in selecting a representative and a chairman? Also what is your thought on using a single arbitrator?

A. O.K., that is a loaded couple of questions if I ever heard them but Wayne I'll try and deal with both of them, and I deal with them in opposite order. First of all the debate between sole arbitrator versus three-men on Board, is an ongoing one. As far as a three-man Board is concerned versus a sole arbitrator, I think there are only three points I should make. A three-man Board is more expensive; that's obvious because you have to pay your nominee. Nominees don't like to admit they're being paid; they like to say they're getting an honorarium. Well that's nonsense, they are getting a fee. The second problem is that it is more difficult to schedule a hearing because you are accommodating three party's schedules. But those are the only significant factors in terms of that matter. On the other side of the coin, as to a sole arbitrator -- the trouble there is that you have got one person playing "God" with your collective agreement. Arbitrators are human and they miss things, they misunderstand or they are tired or hung over or a variety of things and a case goes off the rails. If it is a three-man Board, the nominees may frequently play an important role putting the Chairman back on the right track. Now you're going to have to accept some of that on faith from me because you don't know that from reading the arbitration award but I can assure you that the nominees in many cases, by no means all, but in many cases do play an important role at least in the reasoning. Indeed a couple of cases, both of which I was involved in with Bill Walsh who appears in this film; he was the gentleman you recall who asked that sly question of my witness at the end of the examination--"Well in all that excitement, did you get time to read the grievance"? Heck of a good question but then Bill is a heck of a good nominee. In any event, in two cases Bill and I decided the case, the Chairman dissented. So the nominees do play a meaningful role. Having said all that, much depends on the quality of the nominee and that's really your first question to me--who do you look for either as a nominee or as a Chairman? Well, as to a nominee, it's not enough to have a warm, live body, you've got to have somebody that will be listened to by the arbitrator because that is the role of the nominee. The nominees' work begins when the case is concluded and the Board sits down in what is called the Executive Session and the arbitrator, the Chairman turns to the nominees and says, "What do you think"? That's when the nominee earns his fee. If the Chairman is not going to pay any attention to him, then you have wasted your money because that nominee is not going to be at all persuasive. That nominee has to have some credibility; he has to be someone who the Chairman respects and someone who the Chairman will listen to in the sense that he isn't just going to parrot the argument the side that nominated him has put forward.

As to a Chairman and who you look for seem to me that there are three criteria. I think the first and most important criteria is that you get a Chairman or an Arbitrator who is going to give you and the other side a fair hearing--fair in the proper legal sense of that word. I think the second criteria is that he is going to have some understanding and awareness of the arbitration process and some recognition of the dynamics of this process. He may be a sensitive, perceptive person, but unless he or she has some knowledge of the process, I don't think that person would be a very effective arbitrator. You have got to understand the politics and the dynamics and politics again in the best sense of the word. The third criteria is an intangible. The best word I can use is integrity; that is an arbitrator who is prepared to make a hard, difficult decision and as Howard Cosell would say, "To call it like it is." You may not be happy with the result but if you got an arbitrator who says, "Look, I'm going to deal with this honestly and I'm going to give it my best intellectual shot and I'll tell you how I feel in straight up terms." That is really all you can ask for. Those are the criteria I look for. Now, to test that criteria; that's difficult. There are only about a couple of things you can do. One, you can talk to other people who have had experiences with that possible arbitrator when you're in the decision making process of who it is going to be in order to get an assessment. Remember the emotionalism in this field. Remember that the definition that many people have of a good arbitrator is somebody who agreed with them last time out and the bad arbitrator is one who disagreed with them. Now that is simplistic but it is true. So watch individual kinds. Secondly, you can read the jurisprudence. That is you can get a feel for the arbitrator, but that is misleading to because as I have stressed a number of times, there are only a small number of cases that are reported that is over all. Just as a footnote in case you think the emotionalism aspect has been stressed too much by myself--recently and I know better, I was walking out of an arbitration hearing and I said to my client, "Well, I just hope we get justice from that arbitrator." My client stopped dead in his tracks and said, "What the hell is this justice business; I want to win." That's the way it is. Maybe it shouldn't be but that is the way it really is.

Q. What do you think of recording arbitrators?

A. Almost always, there is a couple of arbitrators who use recording devices. One that I ran across in N.S. and I won't name him, some of you may know him, is even less mechanically inclined than I am, and I am terrible when it comes to machinery, and it was a foul up like I have never seen--buttons were pressed and tapes were flying in all directions, a terrible fiasco.

Q. (Not on Tape)

A. Yes, a lot of people have wondered why arbitrators don't have a shorthand reporter or don't use some recording mechanism as the clerks do. I'm not sure I can answer the proposition. I'll tell you what arbitrators have said to me when I've asked that question. First, it's cost and the second is a more difficult one, and that is, they say "Well, it is going to take time to transcribe those notes and indeed once the notes are taken down, that may form the basis for a court matter and we don't want that to happen and we're afraid of encouraging court action." I'm not so sure that either of these answers are very satisfactory. But the practise has been for a long time, well since the very beginning, that evidence be taken down in long hand.

Q. Why in your argument would you make reference through precedent setting cases, when as I understand it, earlier you said that they played no part in arbitration law as in civil law?

A. I didn't intend to imply that they don't play any part. What I said was that arbitrators are not bound by precedence. Now, I said to you earlier that the purpose of an argument is to try and persuade an arbitrator in the light of a clear cogent argument that you are right. One of the most effective ways to accomplish that is to say to the arbitrator, "This same point has been decided by other arbitrators. I know you're not bound by what arbitrator 'X' said, but I think the reasoning that that arbitrator used is persuasive and I commend it to you." Here is what that arbitrator said, faced with the same problem that you are faced with Mr. Arbitrator. The arbitrator can then say, "Yes, I think that makes a lot of sense," or he can disagree with it. Or he may say, "I don't buy that at all." The point is that you used the cases not because they are binding but because they are supportive of the proposition that you yourself are advancing. It's helpful if you can say to an arbitrator, other arbitrators have had to deal with the same problem that you're dealing with, and they have come up with answers and here are those answers and they are all supportive of the point that I am making. On the other hand as I stressed a number of times, there are cases when the point that you are making is a novel one and there just aren't any cases on it. What would be an example? Five years ago no one never thought there would be seniority cases and layoffs of school teachers. Nobody even thought in those terms. Well since then, there have been a number of cases dealing with layoffs, redundancies of school teachers. So there's a whole development in law, but the first few cases were really in the abstract.

I close by saying that I enjoyed this immensely. I appreciate your courtesy in letting me address you. I have enjoyed your attention; I've enjoyed your questions and I thank you very much.

CHAIRMAN, IAIN GALLOWAY

I think it's for us to thank you very much John. It has been a very, very stimulating day with a great deal of very hard core information we'll call it. I think everyone has been fascinated that they're going to all rush out and try out their new-found knowledge on arbitration cases but remember, and John would be the first to agree, arbitration is a thing to stay away from whenever possible. It's only a last resort but it has to be there. So now you know what to do in the last resort. Again, on your behalf, I would like to thank John very much.